United States Court of Appeals

for the Second Circuit

APPENDIX

75-6011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

No. 75-6011

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

HEALTHCO, INC.,

Defendant-Appellee

ON CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

VOLUME III

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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PAGINATION AS IN ORIGINAL COPY

UNITED STATES OF AMERICA

vs. 70 Civ 1312

HEALTHCO, INC.(Formerly known as Healthcare, Corp.)

October 29, 1973
9:30 a.m.

(Trial resumed.)

MR. JINKINSON: We call Mr. Ernest Sandler.

E R N E S T S A N D L E R, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. De MARCO:

Q Mr. Sandler, would you state your business, please?

A I am in the wholesale pharmaceutical and dental supply business.

Q That's with Interstate Drug Exchange?

A Yes.

Q Do you hold an office with Interstate Drug Exchange?

A I am the president.

Q For how long have you been president of Interstate Drug Exchange?

A I guess ten years or more.

Q Ten years. And prior to that time were you also employed by Interstate Drug Exchange?

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A Yes.

Q Would you describe, other than generally as you just have, the type of business that Interstate Drug is in?

A Our major business is a mail order business to pysicians, dentists, osteopaths, veterinarians.

BY THE COURT:

Q Where are you located?

A In Plainview, Long Island.

Q Plainview, Long Island. Where is that?

A Oh, about 30, 40 miles out of the City.

Q North shore or south shore?

A Right dead center, your Honor.

Q Not as far as Westbury?

A Oh, further.

Q Further.

A Past Hicksville.

Q Nassau County?

A We are right before the Suffolk County line.

Q Technically in Nassau?

A Yes.

THE COURT: Thank you.

BY MR. De MARCO:

Q Among the business that you are involved in, are you selling dental products, purchasing a wide variety of

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dental products primarily for resale to ultimate consumers of those products, i.e., dentists, dental laboratories, government agencies and institutions?

A Yes.

Q And the predominant customer category of the ones I listed for Interstate Drug Exchange is what?

A Dentists.

Q When did you first begin selling to dentists in the mail order field, as you have testified?

A About 15 years ago.

Q And what methods do you use to sell, have you used during the past 15 years to sell, those items?

A We circularize with catalogs and fliers and we receive orders by mail and telephone.

Q You have telephone --

A Yes.

Q With reference now particularly to metropolitain New York, and when I use that phrase I am talking about the five boroughs of that City, all Long Island, five northern counties of New Jersey and a couple of northern counties of New York State as well, metropolitain New York, do you have a predominant method of selling your products within that marketing area?

A Predominantly it is by mail. I would say about 20

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percent is by phone.

Q Telephone orders.

A Yes.

Q Mr. Sandler, when you process orders from dentists and other customers in dental products, what methods of delivery do you use to get the product to the customers?

A About 99 percent United Parcel Service.

Q The balance?

A Would be parcel post.

Q That's U.S. mail.

A Yes.

BY THE COURT:

Q United Parcel Service.

A Yes, sir.

Q Over how wide a geographical area do you operate?

A The entire United States.

Q And United Parcel covers the whole United States?

A No. There are certain western states that they don't hook up with yet.

Q But that's the one percent, then, where you use postal service.

A No. We use United Parcel as a preferred method of delivery. But they can't deliver to a post office box. You know, if a customer gives us only a post office box as

address, it would have to go by parcel post. But United Parcel gives you free insurance, faster delivery and signature.

Q And so 99 percent of your deliveries are by United Parcel and one percent by postal service, roughly.

A That's only a guess. But the major part of our orders would be United Parcel.

BY MR. De MARCO:

Q Mr. Sandler, among the services, including the United Parcel delivery that you just described, do you also offer any of your customers credit for their purchases?

A Yes. On the phone orders, and we have certain customers who are now accustomed to buying without including a check.

Q Do you have an estimate as to the approximate percentage of your customers that purchase from you on credit?

A Well, we are speaking about the New York area.

Q Yes. Speaking about the New York area.

A I would estimate about 20 percent.

Q Mr. Sandler, does your company maintain its record facilities in any particular form?

A Well, we use a computer for everything.

Q And by that, and your answer is responsive, I am

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asking now all of your orders are then placed somehow in a computer to derive certain information based on all the transactions of the company?

A Yes. The computer takes care of accounts receivable, it takes care of invoicing, inventory control, and we receive certain reports periodically.

Q Among those reports that you receive, are they broken down to indicate sales in metropolitain New York as I have earlier described it?

A No. We break our sales down by category of customer and by state.

Q So you would have some indication of sales made to dentists, for example, in the states of New York and New Jersey?

A Yes.

MR. De MARCO: I am going to show the witness a copy of his survey response for Interstate Drug Exchange, which is part of Government's Exhibit 31 in evidence.

MR. SIRIGNANO: Your Honor, I object atthis time to any testimony on the part of this witness with respect to his sales or references to his survey answers. You may recall last week we requested that the witness when he comes to court be directed to bring with him business records, and very specifically business records, which were covered by a

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subpoena duces tecum which the defendant had served on him some months ago.

I have been informed this morning that there are no business records for us to see and I don't believe that the witness should be permitted to give any testimony with respect to his sales until we have had an opportunity to observe and study the records which he has been directed to produce in court.

THE COURT: Well, I will go into that on your cross examination of the witness. Objection overruled.

MR. De MARCO: Thank you, your Honor.

Q Mr. Sandler, I show you a Xerox copy of a survey response as part of Plaintiff's Exhibit 31. Is that your signature that appears at the bottom of the Interstate Drug Exchange response?

A Yes, it is.

Q And what was the date that you signed that document?

A I would have to look at the document.

Q I believe it is on the bottom line, Mr. Sandler, near your signature (indicating).

A April 30, 1971.

Q Mr. Sandler, do you recall the occasion when you received that document?

A No, I don't. I don't remember it at all. But it is

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my signature.

Q Do you recall any details of completing the document?

A No.

Q Do you recall whether you checked your books and records when you completed that document?

A No. I really had no memory of this until you showed it to me, and I must have done it, but I really don't recall.

THE COURT: What is the document?

MR. De MARCO: The document, your Honor, is the mail order survey form sent to Mr. Sandler's company in 1971.

THE COURT: By the government?

MR. De MARCO: By the government, and responded to by him.

THE COURT: I understand.

MR. De MARCO: And the document says on its face, reported sales of 1970 of $250,000.

Q Is that an accurate reflection of Interstate Drug Exchange sales to dentists, dental laboratories, institutions or government agencies within metropolitain New York for the year 1970?

A No, it is not.

THE COURT: What is it, your best estimate?

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THE WITNESS: Well, your Honor, I have gone back over records. I don't remember this thing and somewhere I must have just guessed and said yes, you know, this is it, without ever going any further into it. I couldn't have attached any importance to it, frankly.

I do have some records here, some computer records, which Mr. De Marco is referring to.

Q Mr. Sandler, you brought those records with you this morning?

A Yes, I have.

Q Would you like to take them out of your briefcase, please? I want to ask you some questions about them.

This summer sometime, did you receive a subpoena duces tecum addressed fromthe defendant in this case, Healthco, to you, to Interstate Drug Exchange, calling for the production of certain books and records of your company?

A Yes, I did.

Q What was your response when you received that subpoena?

A I called my attorney and said it was a crazy subpoena. I said it would take years to get together all the information which was requested, and my attorney informed me that certain records were privileged anyway and we would not have to produce them.

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I think income [illegible] statements, lists of customers and so on.

Q And subsequent to that telephone conversation with your attorney did you call me directly in New York?

A I called the firm in New York and I think they referred me to you or you called me back. I don't remember the exact sequence.

Q But I returned your phone call, did I not?

A Yes.

Q And we had a conversation at that time, did we not?

A Yes.

Q And what was the result of that conversation?

A You came down to my office and I said there were certain records which we did have which were readily available and if they would be acceptable then I could produce them.

Q All right. Have you brought those records, the ones you are talking about, to court with you this morning?

A Yes.

Q May I have them, please?

A Yes (handing).

MR. De MARCO: Let the record show that I am transmitting these records to government counsel at this time.

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Q Mr. Sandler, briefly, would you describe what these records are?

A Yes. From our computer we got a report which gives us our gross sales by state and our gross sales to each category of customer that we service.

Q In other words, you are able to determine from those records sales, for example, to dentists in the states of New York and New Jersey?

A That's correct.

Q And I believe the records will show they are available only since 1970 but up through, when we looked at them, 1973, is that correct?

A Yes.

Q There were no records prior to 1970?

A No. I think we looked around and didn't find any?

Q In reviewing these records, Mr. Sandler, it was apparent that we did not have from them actually the metropolitain breakdown that we talked about; we only had reports, isn't that correct, from New York and New Jersey?

A You know, maybe you ought to tell the government, since we go strictly by number, number 62, I believe, is New Jersey and number 66 would be New York.

MR. De MARCO: Is that clear? For New York, rather than the name of the state he uses a number for the entry.

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MR. SIRIGNANO: Your Honor, we haven't had an opportunity to see any of the documents. We requested them prior to coming in here and Mr. De Marco waited until the middle of the witness' examination to hand them to us.

THE COURT: I will give you a reasonable time to look at them.

Q On that point, Mr. Sandler, you just described the telephone conversations and meetings we had this summer concerning these documents. Have you ever received a telephone call from any of the government lawyers asking for information about your sales?

A Yes. Someone called me, but I don't know who it was.

Q How long ago was that?

A I would guess a month or two ago.

Q A month or two ago. At that time did anyone identifying himself as one of the government lawyers ask you for your records?

A No.

Q I was at the point in asking my questions about the fact that these reports only show states of New York and New Jersey, among other states, and sales to dentists. Was there any procedure which you were able to go through and did

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go through to break down some estimate of sales within metropolitain New York, and if so would you describe how you did that?

A Yes. You gave me a list of zip codes which apply to those areas, and what I did was I asked my data processing manager to break out sales, I think it was for a period of two weeks, and just list off those sales in those zip code areas for that period of two weeks.

Q The zip code was for the various counties?

A Yes.

Q That make up metropolitain New York?

A The areas, whatever.

Q And you got a special printout, then, for the two-week period within those counties.

A That's correct.

Q And what did that printout show with reference to the total sales made as listed on your reports, your montly reports, for New York and New Jersey?

A Well, for purposes of comparison, you could say that these districts would accurately reflect the figures that we show for our gross sales in New York State alone.

Q In other words, by taking the counties in New Jersey that are applicable and excluding the counties in New York State that are inapplicable, the New York State figure comes

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up fairly close to what metropolitain New York sales are?

A Yes.

Q Mr. Sandler, under that method of inspection, what were your sales, approximately, in 1970 to dentists, of dental products in metropolitain New York?

A In 1970 we showed 647,988. It is approximate.

Q Of course. In 1971?

A We showed 561,987.

Q And in 1972?

A $789,072.

Q I realize that 1973 is not yet over with, but do you have an estimate based upon that analysis as to what your sales will be in metropolitain New York of dental products for 1973?

A I believe we will go around a million dollars this year.

BY THE COURT:

Q Mr. Sandler, what this means is, I take it, that nearly all of your business in the State of New Jersey and nearly all of your business in the State of New York is in the metropolitain New York area.

A Well, we found through previous surveys, your Honor, that our business is directly proportionate to the number of physicians in an area, really; that if there are

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a hundred physicians in this area we are going to do business with, say, 20 percent, or 20 of the, or 30 percent, whatever the percentage may be.

Now, your biggest population would be in this area, you know, where you have a population, I assume of 15 or 20 million people.

Q Yes. But the rest of New Jersey and the rest of New York would on sheer numbers count for more than your figures indicate.

A No, because -- well, you take New York, I think the total population of New York State is about 17 or 18 million. But New York City and Long Island would probably account for 12 million of that, and in the rest of the state you would only have five or six million people.

Q But, in any event, this sampling seems to indicate that nearly all your business in New York and New Jersey is in the metropolitain area, isn't that right?

A Oh, yes, I would say.

THE COURT: All right.

MR. De MARCO: I think I can flesh this out.

BY MR. De MARCO:

Q Mr. Sandler, what were your sales, for example, in New Jersey in 1970 to dentists?

A 1970 was 312,000.

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Q And in 1971?

A 257.

Q 1972?

A 402,000.

Q Mr. Sandler --

A Could I just say that our 1971 sales would not be accurate.

Q All right. In what way are they not accurate?

A Well, we showed a decline, but it was really because we had had some computer trouble with the new program and we found that there was something screwed up there and it was subsequently corrected around February of '72.

Q You described the computer problem in 1971. Did this --

A It is around December of '71 and January of '72 that we had some problem, because I see the sales are way down and it is really not true.

Q So it understated, your computer problem in these printouts understated, what your actual sales were in 1971?

A Right. The gross sales are correct in those work-sheets of ours, but the individual breakdowns are not.

Q All right. In other words, 1971 shows a slight decline in sales over 1970, but to your best recollection, that is not correct?

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A We have increased every year.

Q Every single year.

A Yes.

THE COURT: Would that also be true as to the New York State figures?

A Oh, absolutely.

BY MR. De MARCO:

Q Mr. Sandler, you testified here that you have been in the business of selling dental products, you have been a dental dealer, for a number of years. Have you an opinion as to the state of competition among the sellers of dental products in New York, say within the last five or six years?

A It is getting fiercer and fiercer.

Q Are there more or fewer sellers now of dental products in metropolitain New York than there were five years ago?

A More.

Q And are there more methods or fewer methods for a dentist, government agency or institution or dental laboratory to buy the products that it needs to use?

A Well, we ourselves have just come into the dental laboratory field within the past year and we have started offering merchandise in certain specialties to the laboratories. With respect to the dentists, we have been expanding

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our line all the time to increase our sales.

THE COURT: Do you sell equipment?

THE WITNESS: Not alrge equipment, your Honor.

THE COURT: What is the largest you sell?

THE WITNESS: We have an ultrasonic unit for about $400 and several autoclaves, sterilizers. But we would not sell dental chairs or the big drill units and so on.

THE COURT: Do you sell precious metals?

THE WITNESS: Yes, gold and silver alloys.

THE COURT: And you sell teeth?

THE WITNESS: No.

THE COURT: So I take it the bulk of your sales are what has been described here as dental sundries? Does that term mean anything to you?

THE WITNESS: We carry a lot of instruments, pliers, you know, the smallest type instruments. We carry a lot of pharmaceuticals and of course the dental cartridges and dental sponges and so on.

I would exclude heavy equipment. It is just something that I feel a dentist wants to go in and feel and look at it. It is a major purchase.

THE COURT: But except for heavy equipment and teeth, you sell nearly everything a dentist buys.

THE WITNESS: Absolutely.

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THE COURT: All right.

MR. De MARCO: No further questions.

THE COURT: All right. Mr. Sirignano, how much time do you want to look at these records?

MR. SIRIGNANO: I would like to first find out with respect to the other records which we requested be produced after I question the witness.

There is one thing. Mr. Dr Marco has in his possession original copies, in fact as far as I know the only copies, of a letter which I sent to Mr. Sandler several years ago with his form, and I would like to have it, please.

MR. De MARCO: For the record --

THE COURT: What is an original copy?

MR. SIRIGNANO: It is a copy from the Justice Department files. When Mr. De Marco requested that he see the original survey forms, response forms, attached to each response form was the copy from the Justice Department files of the letter which accompanies the response form, the questionnaire when it was sent to each respondent.

Mr. De Marco has that copy.

THE COURT: That presumably is in the two file folders which have been turned over to my law clerk.

MR. De MARCO: Your Honor, I think I can save some time. I would be happy to stipulate with Mr. Sirignano -- I

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don't know where that letter is and I don't have it. I agree with your Honor it is probably in that file folder.

THE COURT: Why don't we send up and get it from my chambers.

MR. De MARCO: The letter to each dealer follows a similar format, and I would be willing to stipulate that whatever letter was sent follows the same format as any other, which will save some time.

MR. SIRIGNANO: If you will stipulate that the letter also has a reference to a specific phone conversation which I had with Mr. Sandler, I will stipulate.

MR. De MARCO: I'm sorry. Then it wasn't a form letter. I presumed it was.

THE COURT: Why don't we send for the letter?

Do you want to wait for that before you ask any other questions?

MR. SIRIGNANO: No. I will go on.

CROSS EXAMINATION

BY MR. SIRIGNANO:

Q Mr. Sandler, do you have in your possession, does your company have in your possession, state income tax returns?

A Mr. De Marco asked me for them. I think he asked me for them last Wednesday and I was going out of town. I said I would call my accountant Friday. I called and he was

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out of town but he will be back today.

THE COURT: He has them?

THE WITNESS: Or would know where they are. Frankly, I just don't.

Q Do you have those records going back to 1968?

A I really don't know. I would assume so.

Q Do you have in your possession state income tax, copies of state income tax returns going back to 1968?

A Again, I don't know. I would have to ask my accountant where all that is.

Q And city sales tax returns going back to 1968?

A Well, I know we are required to fill out a sales tax return that lists about 17 different districts in the state. But it is all on one form. I don't think we would have the city separately. We are located on Long Island.

Q But, that is, you would have, as far as you know, copies of returns which would show the distinction between city and other parts of the state.

A Yes, at least recently. I don't know how far back we are required to keep them.

Q Will you furnish copies of those to the government, please?

MR. De MARCO: Your Honor, I am going to object at this point. I would like to state the ground why I am

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objecting.

THE COURT: Yes.

MR. De MARCO: First of all, I think Mr. Sandler has already testified that his business includes other items besides the sale of dental products, and I think, as anyone will know, the state sales tax records are not going to break out dental product sales, the only thing relevant to this case, from all others. We are asking an additional burden on the witness here to bring those records in.

And on top of that the government has had three years to make such request of the defendant. They had notice from the summer that the defendant was looking for those same kind of records and made no efforts to obtain them then. This is an effort, I think, to delay the proceedings and to burden a witness beyond what is necessary, and for that reason we object.

THE COURT: Well, I don't think that I ought to sustain the objection. As far as burdening the witness is concerned, I regret it, and we will do it in as convenient a fashion to the witness as we possibly can, but here is an important civil matter in this court and I have no alternative, Mr. Sandler, but to ask you to produce those records.

We can do it at a time that is convenient to you, but we will have to have them.

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THE WITNESS: Well, your Honor, can I just say something?

THE COURT: Yes.

THE WITNESS: We do have a large portion of our busi ess to physicians.

THE COURT: Yes?

THE WITNESS: And there are sales of products to physicians, syringes and so on, which are also taxable, and all we do is lump together a taxable report which comes in some way from the computer. I don't understand. But there is no product break-out or no category.

THE COURT: Well, that may mean that the information when you get it is not going to be particulary helpful. But I have got to give the government an opportunity to get the figures.

Do you think the accountant could do it by tomorrow or the day after tomorrow?

THE WITNESS: If I can get hold of him today, I don't see why not.

THE COURT: What about the day after tomorrow? Would that give you enough time?

THE WITNESS: Why don't you give me -- all right. Let me try. As long as I can get a hold of him. Either they are in my office or they are in his office.

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THE COURT: All right.

A I know he was away last week and I just couldn't reach him.

THE COURT: Then we will meet in this room at 9:30 on Wednesday morning and you bring the records at that time.

THE WITNESS: Would it be possible, your Honor, just to send the records without my appearing?

THE COURT: I am afraid not. I am afraid not. As I say, we regret this, but this is a matter that has been going on a long time. A lot of time and money. It is a serious matter and I don't really have any choice.

THE WITNESS: All right.

THE COURT: And you are like any other citizen who gets called into a dispute with which you are not personally concerned. But that is just of the obligations of citizenship and I am sorry.

THE WITNESS: All right.

BY MR. SIRIGNANO:

Q Mr. Sandler, would you fill me in on how you determine which part of your total sales in metropolitain New York represented sales to dentists? I am afraid I didn't follow you.

A Well, first of all, we have our sheets which are there, which break down the breakdown by state only. That's

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how we keep our records, and I get amonthly report showing the breakdown. I think we have about eight different categories: M.D.'s, D.D.S.'s, osteopaths, veterinarians, drugstores.

When Mr. De Marco questioned me about it, I said we didn't have this broken out, you know, in this fashion, and he said, well, is there some way that we could approximate this.

So what I did was -- I would have to go into a long, involved discussion of how we bill and so on with computer cards, IBM cards. We operate with UNIVAC. Everybody calls them IBM cards.

But what we do is, after shipping, we break out our cards and then we duplicate them and refile them. So what I did was I asked my data processing manager to break out two weeks' sales that he had fairly convenient and what he did was -- let's see, he ran those total sales to dentists in those zip code areas for two weeks and came up with a figure of 38,000, which would exclude charge orders. These were orders that were received with checks. And you can have this list if you like.

Q Let me understand. I am trying to follow. When you say 38,000, is that the number of dentists or dollars?

A No. That is $38,000 in business to dentists over

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a period of two weeks in those zip code areas. And we extrapolated from that that our total New York business, I think, was about 75,000 or $80,000 for that month and that therefore the figures for the metropolitain area wouldn't affect -- equate to our gross New York figures.

Q Let me get it straight. That figure represents your total sales in New York or just to dentists?

A No. Our sales to dentists in the metropolitain area by zip code as given to me by Mr. De Marco, and it is higher than the 38,000 because there are open account orders in here which would not show any receipt of money.

In other words, they were charge orders and all they show is a zero zero on it. Where a physician sent in $43.30, it would show up on here.

Q You took that amount and compared it to what, sir?

A To our monthly sales in New York.

Q To all categories of customers or --

A No, no, to dentists. This only has to do with dentists. In other words, on our cards we have coded a -- a 1-code is an M.D., a 2-code is a D.D.S. He sorted out his D.D.S.'s by zip code again and then just ran this report on sales.

Q Now, would your records show sales to dentists in other parts of New York State?

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A No, no. Our records actually show sales in all of New York State and in all of New Jersey. We do not break it out by the metropolitain area only.

Q Do you have records which show sales to dentists in other parts of the country?

A Absolutely. Those lists list every single state that we seel in and the sales.

Q Are those the records that you have provided here this morning?

A Yes.

THE COURT: The record should show that the two file folders with the back-up material for the government survey have been retrieved from my chambers and have been made available again to the government.

MR. SIRIGNANO: I would like to have marked for identification carbon copy of a letter addressed to Mr. Sandler dated April 29, 1971.

THE COURT: All right.

(Government's Exhibit 58 was marked for identification.)

Q Mr. Sandler, will you look at this (handing)?

(Pause.)

A Well, I don't recall the letter, but I assume I received it.

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Q Do you recall having a telephone conversation with me?

A No. You are going back several years, I believe about two and a half years. Right?

Q You stated that when you made your survey response you didn't know what it was being used for, is that correct?

A No, no, that's not true. I mean it is on the top of the thing. I frankly don't remember the entire incident, to be honest. I just have no recollection of it whatsoever -- I mean filling out the form or receiving this letter or speaking to anyone over the phone.

The first thing, frankly, that I even knew anything about this was when I received a subpoena from Mr. De Marco.

Q And you have no recollection of filling out the form, you say.

A No.

Q Mr. Sandler, will you tell me, first, are there any other companies engaged in the dental product field with which Interstate Drug Exchange is associated or affiliated?

A Yes. We own a small dental dealer in New York.

Q Whatis the name of that company?

A Beacon Dental Supply.

Q Now, are you familiar with the operations of Beacon Dental Supply?

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A Well, I don't concern myself too much with the operations of Beacon.

Q Are you generally familiar with it?

A Only in a general way.

Q Do you know where Beacon gets, purchases the dental products which it sells?

MR. De MARCO: Your Honor, I am going to object to that question. The witness has already indicated he is not familiar with the operations of Beacon.

THE COURT: If he can't answer it, he can always say he can't answer it. I will permit it. Overruled.

THE WITNESS: No. If I can explain, your Honor, I mean I don't know what is pertinent --

THE COURT: If he asks you a question about Beacon and you don't know, all you have to say is I don't know.

A Well, then I have to answer I don't know where they obtain merchandise.

Q Where does Interstate purchase its merchandise, that is, the dental products which it resells?

A A large supply is funneled through Beacon. That's really the purpose of the Beacon acquisition, to obtain dental supplies.

Q Would you happen to know whether or not Beacon obtains

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any of its supplies from Healthco?

A No. I would have to answer I don't know.

Q Would you be in a position to ascertain whether Beacon in fact purchases, makes any purchases, from Healthco?

A Oh, absolutely. All I have to do is call and ask.

Q Your company controls Beacon.

A That's correct.

MR. SIRIGNANO: I would like to ask that we be provided with any records of Beacon, or in lieu of records compilations, of what purchases Beacon has made from Healthco since 1970.

THE COURT: Can that be done, Mr. Sandler, without too much trouble?

MR. De MARCO: Your Honor, excuse me. It will be with objection from the defendant. It is again an effort on the part of the government midway in the trial to make a witness a courrier for its record keeping. It surveyed -- Beacon is one of the surveyed companies. The government was aware of the Beacon company a long time ago, three years ago.

THE COURT: If it isn't too burdensome on Mr. Sandler we will -- can't that be done?

THE WITNESS: I can call up and try to ask them. I don't pay too much attention to Beacon.

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THE COURT: Call them up and ask them if they will give us their purchases from Healthco for 1970, '71 and '72, please.

MR. SIRIGNANO: I would like to defer any further cross examination until I have had an opportunity to examine the records which have been produced today and which will be produced on Wednesday.

THE COURT: Well, all right. Then, Mr. Sandler, if you would get that last information from Beacon -- and does Mr. Sandler know exactly what you want? You want New York State sales tax returns and income tax returns for the years '68 through '72, is that it?

MR. SIRIGNANO: Yes.

A Did he ask for income tax returns also?

THE COURT: Is that what you want? Do you need income tax returns?

MR. SIRIGNANO: Yes. Both, please.

MR. De MARCO: For the company?

MR. SIRIGNANO: For the company, of course.

THE COURT: Yes, for Interstate Drug Exchange buyers and this last information about Healthco.

THE WITNESS: Your Honor, isn't income tax returns privileged information, or am I wrong?

THE COURT: I don't think so.

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THE WITNESS: I can't see the purpsoe of income tax.

THE COURT: I don't know that we need to keep them or to enter them. I don't know that -- Mr. Sirignano, do you have in mind introducing them or offering them in evidence?

MR. SIRIGNANO: No, your Honor.

THE COURT: No. They will be given back to you.

MR. SIRIGNANO: We would just like to examine them. And for whatever it is worth, Mr. Sandler, we have no intention of taking any of the records which we observe and making copies. It is solely for informing ourselves for the purposes of your examination, nothing further.

THE COURT: And then they'll be given back to you, Mr. Sandler.

MR. SIRIGNANO: Exactly.

THE COURT: So don't be concerned about it.

MR. De MARCO: Your Honor, excuse me, but for the record I feel I have to say this. I want the Court to be aware, I want the record to note, that on March 15, 1973, at the deposition, with notice, was taken of William Klein, president of Beacon Dental Products. At that time Mr. Sirignano appeared for the government, for the plaintiff with Mr. Lublinski and Mr. Weiss, three of the attorneys here in the courtroom at this time. Mr. Bianchi and Mr. Galgay appeare

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before the defendant and the deposition was taken of the president of Beacon. That was in March of this year.

There was an opportunity to ask all the questions that Mr. Sandler is by third party going to have -- now I presume to ask and get hearsay from Beacon. The government didn't take that opportunity, and I think it was one of the factors that the Court should consider at this time when asking Mr. Sandler to do this work.

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THE COURT: Well, suppose the government just forgot it. I don't want to try the case on the basis of inadvertence. The case has gone on this long. If it is delayed a little more, we will eventually get through with Mr. Sandler. We can finish with Mr. Sandler on Wednesday morning. We will just take enough time to look at these records and then finish with him.

Mr. Sandler, why don't you come back Wednesday morning and we will do the best we can.

MR. SIRIGNANO: To the extent that the State Sales Tax reflects the City, if there are any sales tax records which are different from the State's, I would like to look at those, too.

THE WITNESS: Yes.

(Witness temporarily excused.)

MR. BIANCHI: Your Honor, the defendant would like to offer into evidence the deposition of Mr. Joe Wolking, which has been marked Defendant's Exhibit N for identification, and a deposition exhibit, which has been marked N-1. We would like to introduce the direct examination of Mr. Wolking, which are pages 1 through 15 of that deposition.

THE COURT: Any objection?

MR. SIRIGNANO: No objection if the remainder of the deposition and the documents which are attached to it

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are also received in evidence.

THE COURT: All right.

MR. BIANCHI: I have not included Exhibit 2.

xx (Defendant's Exhibit N received in evidence.)

THE COURT: As part of the defendant's case the cross-examination of the witness and the exhibit used on cross-examination will be received also. Will you arrange for them physically to be included in this?

MR. BIANCHI: Absolutely.

The second item, your Honor, is Defendant's Exhibit M for identification, which is the deposition of Dundas I. Flaherty. I just received a copy of a letter from the court reporter in California who took this, and apparently there was confusion on the part of the witness as to whether he was to make his corrections in the body of the deposition or on the last page. As soon as he has done that, I will forward it. I would like to offer the signed and corrected copy as soon as we have that.

I would like to offer with that Florida deposition Exhibit No. 2, which is marked M-1 as part of this offer.

THE COURT: The situation is the same on this deposition as on the one which we have just dealt with?

MR. BIANCHI: We are offering pages 1 through 17,

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which is the direct examination.

MR. SIRIGNANO: My position would be the same.

THE COURT: Exhibit M and M-1 are received as part of the defendant's case, and the cross-examination of the deponent and the exhibits used on the cross-examination will also be received. And, again, I am speaking as of the time these physical problems are cleared up.

MR. BIANCHI: I will make sure all the exhibits are included, your Honor.

MR. JINKINSON: The defendant calls Dr. Jay Gould.

J A Y M. G O U L D, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JINKINSON:

Q Where do you reside, Mr. Gould?

A 302 West 86th Street, New York City.

Q In what business are you presently engaged in?

A I am an economic consultant and also president of a firm called Economic Information Systems, a firm which is responsible for offering to business and government agencies facts and figures on the various market shares

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of companies in various markets.

Q Does the company supply information to the government as well as private industry?

A Yes.

Q Could you describe for the Court first your educational background?

A Well, I have a doctoral degree in economics from Columbia University, an education received at Columbia University. I have practiced my profession as an economist over the past 25 years with special reference to the field of ecnomics known as input-output economics, which I will explain in a moment, which has to do with the technique of estimating the share of market from two points of view, the point of view of the buyer and from the point of view of the seller.

THE COURT: Do you go back as far as Professor Seligman? You are too young for that?

THE WITNESS: Not quite, but I have a high regard for Professor Seligman.

Q Have you prepared market analysis of figures in antitrust cases?

A Yes.

Q Will you explain to the Court your experience in this field?

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A Well, over the past 20 years I have been engaged on various occasions to submit in antitrust litigation estimates of market shares, and I have done this on behalf of government agencies and of private companies.

Q What government agencies have you prepared these studies for?

A I was first engaged by the Department of Justice to prepare the statistical exhibits underlying the Brown Shoe case.

Q Did you testify on behalf of the government in that case?

A Yes, I did.

Q As an economist and statistician?

A Yes.

Q Have you done any work for the Federal Trade Commission?

A Yes.

Q In this field?

A Yes.

Q How extensive has this work been?

A Quite extensive. The Federal Trade Commission currently is using a large data base which we supply which offers them information on market shares for something like 1500 manufacturing companies.

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Q Have you written any books, Dr. Gould, on this subject?

A The books I have written apply mainly to my specialty in input-output economics and also my doctoral dissertation. They all have to do with the estimation of market shares.

Q What does that input and output mean? What is the meaning of it?

A It is a way of referring to the commonsense fact that every economic transaction is one between buyers and sellers, and input-output economics has to do with the measurement of that transaction from each point of view.

You might have noted recently that the inventor of the input-output economic theory, Harvard Professor Leontinoff, last week won the Nobel Prize in Economics for his contribution, because it is increasingly recognized as a fruitful way to evaluate the magnitude of economic relationships and how they relate to each other, an extremely effective discipline to be used in the measurement of markets, although, of course, I should say input-output economics as it is used today has a great deal of significance for economic planning precisely because it affords you these two independent ways of gauging a market. It is increasingly used by many countries in fundamental economic planning,

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and that is certainly true of our government, too.

An enormous amount of money has been invested by the United States Government in the collection of this kind of information in its own input-output studies.

Q How is that method of analysis applied to the questions in this case?

A Like all markets, the market involved here, which is the sale of dental equipment and supplies, can be viewed from these two different points of view.

I have reviewed the evidence offered, and I can say that the evidence offered by Mr. Ellis is a very good example of an estimate of this market from the standpoint of the buyer, which is to say, the input side. But I have not seen as yet an estimate for this market as seen from the point of view of the seller, and that is what I feel I can possibly make some contribution to on this question.

Q Have you made an analysis of the market in the sale of dental products on a national basis for the years '67 and '68?

A Yes, I have.

Q Dr. Gould, I hand you a document which has been marked Defendant's Exhibit O for identification and ask you to state what that is.

THE COURT: Does the government have one?

MR. JINKINSON: Yes, they were given a copy.

A This represents a table outlining the procedure that I took in estimating the national and regional market for the sale of dental products and dental products equipment and supplies as measured on the output side, which is to say, from the standpoint of the seller of these products.

Q Looking at the lefthand column of Exhibit O, what does that represent?

A The extreme lefthand column is reserved for the Standard Industrial Classification Code of a series of products listed on this sheet, which are the products that could be produced for use by dentists and dental laboratories.

Q Before continuing further with the exhibit, attached to Exhibit O are three tables which have been marked O-1, O-2 and O-3? Is that correct?

A Yes.

Q Will you explain what O-1, O-2 and O-3 are?

A These are copies of the relevant tables taken from the 1967 Census of manufacturers, tables which offer the figure results of this census tabulation of a survey to all manufacturers of the products in question.

Q Now, returning to Exhibit O, the first page, the columns 1 to 5 have been blocked by a description of

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what?

A A description of the product which could be used by dentists.

Now, I should say that these products fall into three basic industrial categories.

The first industrial category is coded by the government as 3693, a code which describes the products made by producers of x-ray apparatus and tubes; column 6 indicates that in 1967 the total value of such products amounted to 179.8 million dollars.

Q What does column 7 reflect?

A In column 7 I have listed by estimate of the dollar sales for that industry that which could be attributed to dental use.

Q How did you arrive at the basis for that figure?

A I used a simple allocation of 25 per cent based on the fact that there are three times as many physicians in the country as there are dentists, and on that basis possibly have estimated in general one-quarter of the value of such equipment as that which can be attributed to dental use.

Q In column 6 the total given there of $179.8 hundred thousand, how would you find that on the three documents attached?

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A If you look at the first sheet you will find listed with the product code 3693, in the column labeled 1967 Value In Millions of Dollars, the figure of 179.8, given as a total value of product reported by producers of x-ray apparatus and tubes.

Q What does line 2 of Exhibit O reflect --

THE COURT: Wait. Before we get to line 2, Mr. Jinkinson, I see total shipments of 179,800,000, and then I see an allocation to dentists for $50,000,000, but according to my mathematics, 25 per cent of 179,800,000 is something below 45,000,000, and not 50,000,000. So I am puzzled.

THE WITNESS: Your Honor, I am puzzled, too. I did this calculation over the weekend with a hand calculator, and I accept that correction.

THE COURT: Theoretically, the hand calculator would be a whole lot better a mathematician than I am. But in this instance it wouldn't seem so.

THE WITNESS: Yes, I recognize it. The figure should be 25 per cent approximately of 180 000,000, which would be --

MR. JINKINSON: Roughly 44,000,000.

THE WITNESS: Between 44,000 000 and 45,000,000, yes.

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Q Now, referring to line 2 of Exhibit O, what does that reflect?

A Line 2 represents the total sales of an SIC category known as 3841, surgical and medical instruments.

Now, for this industry I listed only those products which I considered to be clearly usable by both doctors and dentists. These products are indicated as various types of disposable and reusable hypodermic syringes and needles, plus anesthesia appliances and oxygen, and they total, I think, something like 124.2 million dollars, of which a 25 per cent allocation would give 31.1 million dollars if my calculations were correct.

Q It seems to be correct in this instance. Now, Doctor, the total I get in column 6 for these various items you have listed here are reflected in 1, 2 and 3 attached?

A Yes, you will find this information is transcribed from the second census table. You will note on that census table there are many items which were omitted, such as operating room furniture, including tables, cases, cabinets, patients' room furniture, including cabinets, desks, dressers and so forth, which in my estimation probably include items that would be sold to dentists, but because I had no easy way of isolating these products,

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I excluded them from this really very rough calculation, which I offer, I should say, really on a common sense basis, without pretending that this represents a precise or the best possible statistics that could be offered if one had more time than I had at my disposal.

And, similarly, if I may go on, for the industry 3842, surgical appliances and supplies, here are used as a very minor portion of this industry which had a total sale of $691,000,000, and I could only find in this industry $112,000,000 of products which clearly had this double use, possible double use, namely, surgical dressings, gauze and cotton, a total of only $28,000,000, which I allocated to the dental market.

Then, finally, we come to the last item, 3843, the industry which produces equipment specifically designed for the dental market, and here, of course, I assigned a hundred per cent of the 21.8 million produced in this industry for the dental market.

Now, adding the figures in column 7, I get 310.9 million, which indicates that for these three basic industries there is in addition to theoutput of the dental equipment and supply industry, at least another hundred million dollars roughly which could be considered part of the dental market.

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I regard the figure of 310 million as being a conservative figure, because I have made no attempt to allow for the statistically difficult task of isolating those products produced in this industry, like 2647, which is the industry that makes sanitary paper products, tissues, I did not include the allocation from the industry called 2654, which is the manufacturer of food containers, including water cups, and a host of other items, probably including soap and detergents, all the things that probably enter into the market. But because they are clearly so difficult to measure, statisticians would be content to regard, I think, the figure of 310 million as a conservative estimate of the composition of the market, at least as seen from the main elements on the producing side.

Q That would represent, of course, the sales of the manufacturers?

A Yes, these are the sales at the manufacturers' level.

Q I see in line 22 you arrive at a figure of 466,000,000. How do you arrive at that?

A Yes, I noted again from the evidence in the record that dental wholesalers apparently operate with a very low mark-up, namely, a 50 per cent mark-up, which in my experience is low. I am generally accustomed to dealing with products

with a hundred per cent mark-up, but I am told that in this industry a 50 per cent mark-up is common and has been entered into the record.

So using that figure, my estimate of the magnitude of this market at the wholesale level is 466 million dollars, which again I would regard as conservative for the reasons I had enumerated before.

Q I think Mr. Ellis testified that the wholesale purchasers made approximately 315.9 million for the year '67. How do you account for the discrepancy between his figure and the figure you produced here?

A Well, I don't think that is correct. My understanding of Mr. Ellis's figure on a national scale given in response to the government's question was that his estimate for 1968 was 529 million dollars, the estimate which he arrived at by surveying the buyers.

I have taken the liberty of taking his 1968 figure and projecting it backwards to 1967 by assuming a 10 per cent change, and I get a figure representing the buyers' side of 481 million dollars. So we are faced with a discrepancy between these two independent estimates, that is, one on the consumers' side, the buying side, and one on the selling side, of a difference between 481 million and 466 million, and I would regard the difference here

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as easily attributable to those items, such as the paper sundries, which I had omitted, and I would regard this as a very good indication of the usefulness of taking these two independent approaches, looking at a market from a buyer's side and from the seller's side, because I think this discrepancy is really very minor, of the order of 1 per cent, and I don't see how anyone could question that both of these figures must be dealing with the same fundamental underlying reality.

Q How would you measure the corresponding market for dental products in the New York area for 1967 and 1968?

A There are several ways of making an allocation to a regional area once you have established a good national market, and in this case I took note of the information that had been entered into to record, the results of the 1969 census of wholesale trade, and here there was a figure which was taken from the census which indicated that nationally there was a sale of dental equipment and supply dealers of 315.9 million. Now I would like to make a comment if I may on the discrepancy between this figure, 315 million dollars, and the 466 million, which I have already offered as my estimate of the wholesale value of theproducts in this market.

It is my belief -- and I have worked quite ex-

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tensively with the census information, both manufacturing and wholesale trade, that the 315.9 million dollars represents a one-third understatement of the true wholesale market for this product, and I believe that the Census Bureau officials would agree with me for the following reasons:

One, I note that nowhere in the 1967 census do they publish a figure which purports to be the total sale of dental equipment dealers. The figure that is published as the 315.9 million figure represents only the sales of those dealers who could be clearly classified by the government as dental equipment dealers, because they took the trouble to fill out that final schedule which requires them to enumerate the merchandise line breakdown of their sales.

Now, because this question is invariably undercovered because there is no provision, there is no mandatory obligation on the part of the respondent to fill out this page, and very often they find it difficult, they simply do not fill it out, and in this case their sales would not be reported in this figure, so that all the merchandise line figures that are published are subject to this understatement, and everyone using these figures knows it, and very often people avoid it for that reason.

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But, of course, it did represent, at least, a minimum, a very conservative estimate, and in that sense one could look both at the figures of 315.9 million reported for the country as a whole, and the corresponding figure related to the New York area, which was 55 million dollars, and regard them both as equally subject to a degree of understatement, which I would regard as of the order of 33 per cent, and to the extent that both these figures are understated, I simply got the percentage relationship between 55 million and 316 million, for me to say that the New York regional allocation of this market would be 17.4 per cent, but it should be applied to the correct national figure of 466 million, and that gave me an estimate, my estimate for 1967 of the total sales in the New York metropolitan area of dental equipment and supplies of 81.1 million, which if you assume the 10 per cent increase that has been discussed here, would represent an 89.2 million dollar market for 1968.

Q I believe you heard Mr. Ellis testify that his estimate of the market, on the buyers, that his estimate of the market was about 60 million dollars for the same period of time?

A Yes.

Q How do you explain the difference of your figure

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of between 91 and 89 and his figure of approximately 60 million?

A Yes, I would explain it on two counts. First, as I understand it, Mr. Ellis submitted his figure as a conservative one, and I think it is. But I note that the difference between his figure and my figure could be regarded as the sales of the wholesalers located in the New York area, but sales which are made outside the area. So if you accept the difference between Mr. Ellis's figure and my figure, that would indicate that 25 per cent of the sales of wholesalers in the New York area are made to points outside the New York metropolitan area.

And I note, too, that this estimate comes to about 25 per cent of their sales, and I was given an opportunity last week to examine the records submitted by the government for the 60-odd firms that were included in their survey, and I noted, too, that about 25 per cent of their sales, of their total sales, seemed to be going outside the New York metropolitan area, in which case I would say that this table confirmed not only Mr. Ellis's figures and my own, but always the government figures, at least with respect to the percentage of sales of New York dental dealers flowing outside the area.

But I would make this final proviso, that this

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does not account for sales that come into the area from points located outside the area. So on this score I would say that Mr. Ellis's figure is still a conservative one.

If I were to hazard an informed guess as to what the truth would be, I would have the feeling in this market that the inflow is possibly as great as the outflow, in which case I would say that the true figure is somewhere in the area, I would say, between 80 and 90 million dollars for the year 1968.

Q Would you consider it a conservative figure?

A Yes, in view of the difficulty of measuring these minor items that are so difficult to measure that these are conservative figures and, certainly, in light of this figure, when I was shown the government estimate of, I believe, 30 million dollars, I would say that is a ridiculously inaccurate and undercovered estimate of this market.

I would like to convey to the Court, if I may, some feeling I have as a statistician engaged in this kind of inquiry over a number of years. I believe this is one of the most undercovered markets as far as the government exhibit is concerned that I have ever seen.

To take a market that clearly is in the area of

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60, possibly 70, 80, 90 million dollars, and to submit figures of 31 million dollars, or whatever it is, I regard as a highly inaccurate statistical exhibit.

THE COURT: Where would I find the 315.9 million on Exhibit A and the 55,000,000 dollar figure?

THE WITNESS: There was submitted, your Honor, in exhibits which I saw.

MR. JINKINGON: I will give you the exhibit number. It went in through Mr. Ellis.

THE COURT: It comes from the Bureau of Census figures?

THE WITNESS: Yes, sir.

MR. JINKINSON: It comes from Defendant's Exhibit F, the $315.9 million.

THE COURT: It comes from Defendant's Exhibit F?

MR. JINKINSON: Yes.

THE COURT: Where does the 55 million come from?

MR. JINKINSON: It comes from Defendant's Exhibit A.

THE COURT: And, Doctor, you used it simply to get a percentage of the New York area as compared to the country as a whole?

THE WITNESS: Right.

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BY MR. JINKINSON:

Q In a wholesale market from an economist's point of view, is there any reason for excluding direct sales by manufacturers in measuring the market?

A No, I don't think so.

MR. JINKINSON: Your witness.

THE WITNESS: May I elaborate on that?

MR. JINKINSON: Yes.

THE WITNESS: Everything produced by the manufacturer has to reach the hands of the ultimate consumer through a middleman of various types, and if a manufacturer seeks to reach this market by setting up a wholesale operation that is run by the manufacturer through the use of sales branches and salesmen, he is to a certain extent conducting a wholesale operation as a kind of secondary activity to the manufacturing function, and as such has to be regarded as part of the wholesale function necessary to convey goods from the factory to the ultimate consumer.

MR. JINKINSON: You may examine.

MR. SIRIGNANO: May I have a 15-minute recess to confer with the government economist and to look at some of the exhibits?

THE COURT: We will come back at 10 minutes after 11.

MR. SIRIGNANO: Yes, your Honor.

(Short recess.)

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MR. JINKINSON: I would like to offer in evidence Defendant's Exhibit O.

THE COURT: And the three attached sheets?

MR. JINKINSON: Yes, your Honor.

THE COURT: Any objection?

All right. Without objection, it will be received.

***

(Defendant's Exhibit O was received in evidence.)

MR. JINKINSON: You may examine.

MR. SIRIGNANO: Your Honor, I would like to get something clear as to Exhibit O.

(Pause.)

MR. SIRIGNANO: I would like to note my objection to those exhibits, your Honor.

THE COURT: All right. Then I will rule on the objection. The objection is overruled. It will be received, and it has been marked.

All right.

CROSS EXAMINATION

BY MR. SIRIGNANO:

Q Dr. Gould, you have no personal knowledge of the dental product field, do you?

A By personal knowledge, I don't understand, do you mean do I ever have occasion to require dental care?

Q No. The conclusions to which you have testified here,

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I take it these are based upon the statistics which you have developed, is that correct?

A Yes.

Q And to that extent your conclusions are based on those statistics and not specifically on any knowledge which you have of sales, about sales of dental products in New York?

A That is true. I would regard Mr. Ellis as someone whose statistical work required him to deal with this market specifically, and in that sense I am not duplicating the expertise that Mr. Ellis would bring to bear on this problem.

Q Now, to the extent that you think you could answer it, you have estimated that thepurchases in metropolitain New York would be as high as ninety million dollars, is that correct?

A Yes, in 1968.

Q In 1968. Now, assuming that the government has in fact in its survey compiled a complete list of dental dealers in the metropolitain New York area. Who would be the sellers to account for that other sixty million dollars?

A Other dental dealers that were not surveyed by the government.

Q That would be outside the New York area?

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A No, no.

Q I asked you to assume for this purpose that the government survey did include all dental dealers within the metropolitain area.

A You are asking me to reconcile an absurdity. I don't understand. To assume that the government figure is correct, then who could possibly account for the discrepancy between 30 million and 90 million?

Q Yes.

A Is that your question?

Q Yes.

A I can't conceive of any possible source.

BY THE COURT:

Q Well, some of it would have to be products that came into the market from outside the area, wouldn't they, doctor?

A No. He is asking to explain -- I have already estimated thatpossibly 25 percent of the 90 million might go outside the market, and that would get me down to about 63 million. So I guess you are really asking for an explanation of how to go from 63 million to 30 million, and the answer to that -- I have no idea.

Q Well, coulnd't it be sales coming into the area from outside the area? Suppose there is a mail order house in Chicago.

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A Yes. But that is not implicit in my 90 million dollar figure. You remember I got my 90 million figure by assuming that 17 percent of the sales, national sales, are concentrated in the New York area, and that comes from the census of wholesale trade.

Now, those figures are based on the sales of dealers in the location. In other words, the 90 million dollar figure would have to be regarded as only those sales of dealers located in the New York area, and if I could include sales of outside dealers coming into the New York area the figure would be much higher than 90 million dollars; it might be 120 million dollars.

Q Oh. In other words, the 17.4 percent relationship local to national is based on sales of dental dealers in the New York metropolitain area.

A Exactly.

Q I understand.

A But now you see why it is impossible to answer the question. I can get down to 63 million, but then I would still have to allow for some coming into the city from outside dealers, which would take me up again possibly to 80 million or so.

So the difference between 80 and 30 million I couldn't possibly account for except, as I haveindicated, I think this

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reflects a rather shocking inability of the government to check, in terms of the actual respondents in the area, figures that even the census bureau could have given you, that 55 million dollar figure.

I mean, having been given that figure, that at least could have given you some indication that there must be respondents located in this area who would at least have given you a 55 million dollar figure.

So I really can't answer your question.

BY MR. SIRIGNANO:

Q Dr. Gould, if you were analyzing a local market involving the merger of two commercial banks, on the basis of your approach, if you assume that a commercial bank gave house mortgages, would it not be necessary to take into consideration house mortgages given by savings and loan corporations?

A I suppose so.

Q And by savings banks?

A Yes.

Q And insurance companies?

A Yes.

MR. SIRIGNANO: I have no further questions.

THE COURT: All right.

MR. JINKINSON: No further direct.

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THE COURT: All right. Thank you, doctor.

(Witness excused.)

MR. JINKINSON: Just as a matter of correcting the record here, Mr. Bianchi wants to make a statement.

MR. BIANCHI: The two exhibits, your Honor -- when I made my offer of Defendant's Exhibits M and N, which were depositions the government wished to offer -- are now marked as Plaintiff's Exhibit M-1 and Plaintiff's Exhibit M-2.

MR. SIRIGNANO: I don't understand.

THE COURT: I agree. I don't either.

MR. BIANCHI: With regard to each of these depositions, M and N,. the plaintiff asked, and the Court admitted, one additional deposition exhibit in each case.

THE COURT: Yes. That was an exhibit on the direct examination.

MR. BIANCHI: Right. And those two additional exhibits are marked M-2 and N-2, each with its own deposition. So that the Court now has the deposition in the complete form in both cases, including all the exhibits attached thereto.

THE COURT: Including any exhibits offered by the government?

MR. BIANCHI: That's right.

THE COURT: All right. Very good.

* * * *

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
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UNITED STATES OF AMERICA
v.
HEALTHCO, INC. (formerly known as HEALTHCARE CORP)

November 1, 1973,
10:15 A.M.

--

THE COURT: Good morning. I believe we have Mr. Sandler and his records. I think Mr. Sandler is here. They were able to get word to you to come this morning instead of yesterday.

THE WITNESS: Yes, sir.

THE CLERK: Mr. Sandler, you are still under oath.

E R N E S T S A N D L E R, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. SIRIGNANO:

Q Mr. Sandler, I believe you testified previously that you had no recollection of your filling out a questionnaire sent to you by the Antitrust Division.

A That's correct.

Q And you stated you had no recollection as to whether or not you had a telephone call from me, a conversation with me.

A That's correct.

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Q You still at this time have no recollection of that?

A No, sir.

Q I believe you testified that you received a subpoena from Mr. De Marco, at that time he showed you a copy of your return, of the questionnaire which you had sent to us; is that correct?

A It's possible. I don't really remember whether he showed me that at the time.

Q But you did recognize the questionnaire with your signature?

A I recognized my signature, yes.

Q But that still did not bring back your recollection of circumstances under which you filled it out?

A No, it didn't.

Q After some conversation with Mr. De Marco, you prepared an affidavit which you gave to Mr. De Marco; did you not?

A Yes.

Q You stated in that affidavit that at the time you filled in the form you didn't know what it was for and that you made a guess?

A I don't remember the exact wording, but the part about the -- the only thing I can assume is that I just said to somebody in my organization, you know, what are we doing,

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or something, give me an estimate. And I think on the original form it said that this is an estimation that we handle a great deal of pharmaceuticals, or something like that.

Q I am directing my question to the affidavit which you made out. Didn't you state in the affidavit, "At the time I filled in the form I made a guess," and that you did not know at the time what the purpose of that questionnaire was?

MR. DE MARCO: Your Honor, I will object to the question. The affidavit has been attached to the brief. I will be happy to read the question. It is an unfair characterization of what the statement is in the affidavit. The statement is, paragraph 3, "I did not realize" --

THE COURT: Maybe we can just show the affidavit to the witness. I will have to sustain the objection as to form. If you tell me that it doesn't accurately reflect the affidavit.

Q I will ask you, Mr. Sandler, to read that portion of the affidavit referring to your statement as to the time you made the response to the form.

A I think it's paragraph 3, it says, "I did not realize at the time I responded to the questionnaire the purposes for which the answers would be used and since the

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questionnaire only requested approximations, I made a guess as to what IDE's sales to dentists in metropolitan New York were." I would say that is approximately correct.

Q If you presently have no recollection about having filled in that form or about any conversation which you may or may not have had with me at the time, how can you make a statement as to what was in your mind when you filled out that form?

MR. DE MARCO: Your Honor, I will object to that question. It's argumentative.

THE COURT: I will permit it. It is cross-examination.

A Frankly, the figures are not accurate on that return, obviously. After I went over my records with Mr. De Marco, as I said, the only thing I can figure out is, I probably had my assistant sitting there and I said, you know, what would you guess our sales in metropolitan New York are?

Well, maybe they are half of our sales in all of New York State.

And what do we do in dental supplies, or something like that; and he may have said 10 per cent, you know, or something like that.

I don't know where those figures came from, very honestly. But I think we said $250,000 and $25,000 in dental,

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if I recall correctly.

THE COURT: I get the gist of what you are telling us, Mr. Sandler, is that you can't explain how you got the figure because you can't remember it.

THE WITNESS: I can only guess at it.

THE COURT: It is speculative, Mr. Sirignano.

Q Mr. Sandler, you stated in your conclusion that your sales in 1970 were in fact over $600,000, was based upon examination of your total sales figures in New York and New Jersey for the year 1970, plus a computer printout which established by zip code the percentage of your sales in the zip code counties of metropolitan New York; is that correct?

A Yes.

Q When you brought in the documents which you were requested to bring in when you last testified, you did not bring in the complete printouts covering that year 1970, did you?

A Which printouts are you talking about?

Q As to sales.

A Complete printouts as to our sales where?

Q I will show you the printouts.

A Are we referring to my computer printouts?

Q Yes.

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A You returned them to me. I brought in whatever I had.

Q That covered only nine months of 1970; is that correct?

A Well, frankly, we used these printouts for internal purposes, and I was surprised that a lot of them just hadn't been thrown out. I mean, we use them to check our sales in certain states and our gross sales, etc., and that's it.

I just happened to have them all thrown in a drawer, your Honor, and when Mr. De Marco came out to me, I said I will get together whatever I could, and that is what I did. There are some missing, I realize that.

Q You do not have the printout which showed the relative sales in counties within metropolitan New York for that two-week test period of which you spoke?

A Yes, I do have.

Q But youdid not bring them to court, did you?

A Yes, I have them here. I don't think anybody asked me for those. But I have the printout by customer and a total, if you'd like to see it.

Q You did not show those to us when we were last in court.

A I had them here. I don't know whether anybody asked for them. Would you like to see them now?

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Q We requested at the time all the records you brought in with you.

THE WITNESS: I don't know; we went through some records, your Honor. I have this printout here, if you'd like to see it. I'm sorry if I didn't show it to you before.

(Handing)

MR. DE MARCO: I think the record should show, and this is a little difficult, but I want to put it in at this time. These records which the government is looking at are precisely the records which Mr. Sandler left with him when we were in court --

THE WITNESS: No, that was not left.

MR. DE MARCO: Excuse me. The others were?

THE WITNESS: Yes.

THE COURT: Let us not get the record any more confused than it is. These records Mr. Sandler says he hasn't shown the government before possibly because they weren't asked for. Do you want a few minutes to look at them?

MR. SIRGIMANO: I'm sure it will take only a few minutes, your Honor.

THE COURT: All right. Take your time. We will wait.

THE WITNESS: If you want me to explain them, we can do that.

(Pause)

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Q Mr. Sandler, will you tell me, on the basis of all the material which you have brought in, is there any basis upon which one could ascertain with any certainty the correctness of that figure of over $600,000?

A Are we talking about our sales in New York State?

Q No, I am talking about your estimate that the sales in Metropolitan New York in 1970 were over $600,000 as contrasted with $225,000 figure which you reported in the government questionnaire.

A The computer sheets are taken directly from our sales, number one.

Q But those computer sheets are not complete for the year 1971, are they?

A I believe some are missing and that just estimates were put in, that's correct.

Q There is no way --

A The month-to-month, it doesn't vary by that much. I mean you won't get any month ordinarily where one month is $50,000 and another month is $10,000.

Q This other computer sheet would not establish specifically what the percentage of the sales in New York State or total sales in New Jersey would be within the counties of the Metropolitan New York area?

MR. DeMARCO: Again objection, your Honor.

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wc:mg 2 Sandler - cross

It is argumentative. It is arguing with the witness.

THE COURT: No, I will permit it.

Overruled.

A These sheets were taken from sales, I believe, of two weeks, and I can tell you how they were done, your Honor.

When we make a shipment, we pull a header card on a doctor, and into that header card is punched the money that is received.

If there is no money punched in, then it means that it was a charge order, you know, a non-payment order.

Now, at the end of each week -- there are also product cards that follow this card for billing purposes and for inventory and so on -- at the end of the week these cards are sorted down, the dollar amount is dropped out of it, and they are interfiled back into our master file, because we have about 80,000 accounts.

And all this is done on a relatively automatic and routine basis.

Now, what I did, at my suggestion and at Mr. DeMarco's request, was, we took two weeks' cards, we sorted out those carrying a dental code, and the zip code, that he said were involved, and we ran a grand total.

Now, this would indicate that our sales were

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$38,628, which would be about $19,000, $20,000 a week, which would be a million dollars a year, and that is approximately what we estimate our sales will be for the year.

Now, there is no reason to suppose that this is not typical of any other week, frankly.

THE COURT: Mr. Sandler, how did you adjust, if you did, for the fact that there were some sales on credit?

THE WITNESS: There are also payments on account that come in where cards are punched. And, if anything -- I don't know if they are included in here, frankly, but it would only raise the figure, because those sales on account represent zeroes here right now. Eventually those payments would come in.

THE COURT: But for the purposes of this figure that you got --

THE WITNESS: It would be a highly accurate figure of those sales.

THE COURT: -- it would be exclusive of sales on credit?

THE WITNESS: Yes. Except that, as I say, there may be some on-account payments in here too. I mean, you are running on a constant basis of people ordering, sending in a check ten days after they get the order, the

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end of the month. You know, it is not handled exclusively to make a report for this trial.

But I would say that that is a highly accurate figure. But if anything, the on-account payments would, if they are not reflected in here, would mean that our sales were higher.

THE COURT: Do you know whether they are reflected or not, the on-account payment?

THE WITNESS: No, those current shipments were not reflected in there. Obviously we had not received the money.

THE COURT: Yes, I know, but do they reflect on-account payments for past shipments?

THE WITNESS: It is a possibility and I don't know. I just asked him to throw in all his cards. But I assume one would balance the other anyway.

THE COURT: So either they are accurate because the on-account payments balance the credit sales --

THE WITNESS: Right.

THE COURT: -- or they are understated, it is understated, because it does not include the credit sales?

THE WITNESS: That is correct.

THE COURT: All right.

BY MR. SIRIGNANO:

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wc:mg 5 Sandler - cross

Q Am I correct, Mr. Sandler, that the actual documents which we have here would not permit one to ascertain whether the -- I'm sorry, I withdraw that.

The ultimate figure which you reported as your 1970 sales of over $600,000 still is an estimate which you have made?

A You would consider it a very close estimate.

Q And involved in making that estimate are necessarily records which are not presently in the courtroom?

A Yes, that would be correct.

MR. DeMARCO: May I inquire what the witness is being shown?

THE COURT: Yes. You can see it if you like.

Q Mr. Sandler, I believe you testified that Interstate Drug Exchange's source of supplies of the dental products it sells are from its wholly affiliated Beacon?

A Well, not exclusively, but quite a bit, yes.

Q Will you tell me now if Beacon obtains dental supplies from the defendant Healthco?

A Beacon obtains ~~health~~ DENTAL supplies from Rower, which I understand is a subsidiary of Healthco.

Q Can you tell me how ~~many~~ MUCH those purchases were in the years 1971, 1972 and 1973?

A 1971 was approximately $115,000, $116,000.

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1972 was $268,000.

1973 to date was $270,000 approximately.

Q These represent dental products which you could not purchase directly from the manufacturer, isn't that true?

A Yes. I have to assume that, because I don't know what products are really being purchased by Beacon from Rower, specific products.

MR. SIRIGNANO: I have no further questions.

THE COURT: I take it Beacon is a competitor of Rower, isn't it?

THE WITNESS: The retail part of Beacon is, yes, your Honor.

THE COURT: All right.

Mr. DeMarco?

REDIRECT EXAMINATION

BY MR. DeMARCO:

Q Mr. Sandler, referring to the testimony you just gave of Beacon's purchases from Rower, it began in 1971, I think, the figures began in 1971.

Were there any purchases of yours prior to that date?

A Yes. Well, that branch I think was called Premier Dental and it was independent.

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Q Excuse me.

My question was, were there any purchases from Healthco or Rower prior to that date by Beacon?

A No, not to my knowledge, and he didn't give me anything on it.

Q Referring to the figure you stated was $116,000 worth of products purchased by Beacon -- approximately $116,000 -- from Rower in 1971; can you estimate for me, based upon the sales figures that you have, total dental product sales, total sales to dentists, by Interstate and Beacon in the year 1971?

A I had some sort of figure. I think it was about $600, I think.

Q No. My question is not in the Metropolitan New York area, Mr. Sandler. Throughout the United States, total sales by either Beacon or Interstate Drug products to dentists.

A In 1970?

Q In 1971.

THE COURT: Well, now, wait. That is not a question, "by either Beacon or Interstate Drug."

I mean, don't we have to have either one or the other?

MR. DeMARCO: I would like to include both of them.

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THE WITNESS: Well, Beacon has its own independent sales, your Honor.

THE COURT: Of course. That's why I can't understand why lumping them together helps very much. But at least we want the aggregate sales of Beacon and Interstate Drug Exchange all over the United States in 1971.

Is that it?

MR. DeMARCO: That is correct, your Honor.

A I am just going to have to give you an estimate of my dental sales. We are talking about 1971, right?

Q Yes, Mr. Sandler.

THE COURT: These are sales to dentists?

THE WITNESS: Dentists.

THE COURT: Dental laboratories?

THE WITNESS: Yes, sir.

THE COURT: Institutions for dental purposes, is that it?

MR. DeMARCO: Your Honor, that's right.

A I am just taking some totals.

Q Let me withdraw that question. This is giving you some difficulty and taking some time. Perhaps I can rephrase it.

Can you tell us in your estimate what the effect of the purchases Beacon made-- excuse me, strike that --

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what the relationship is between the purchases Beacon made from Rower in 1971 and the total sales of dental products made by Interstate and Beacon in 1971?

A Well, it would have to be relatively insignificant.

Q Thank you.

And that would be true also of 1972 and 1973?

A Yes. I have Beacon 1971 gross sales figures.

THE COURT: What are they?

THE WITNESS: Beacon's gross sales figures were approximately $1,800,000.

Q $1,800,000?

A Yes.

Q I think you testified that the amount purchased by Interstate through Beacon --

A No, no. By Beacon, because that merchandise can go to either company.

Q Can go to either company?

A Yes. But it was $268,000 or something of that order.

Q I don't believe I got an answer to my question:

Would it also have been insignificant, those purchases made by Beacon, from Rower, in 1972, with respect to the total sales of dental products made by either Beacon or Interstate Drug?

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A I believe our total sales are now exceeding $5 million to dentists, so $268,000 would not represent a large amount of purchases.

Q Mr. Sandler, when did Interstate Drug acquire Beacon?

A Between six and seven years ago.

Q I didn't hear you.

A Between six and seven years ago.

Q Can you describe the circumstances under which you acquired Beacon?

A Yes. Mr. Klein, who was the owner of Beacon, came to me, and we had been doing some business with him prior to that time, and said he would like to sell his company for two or three reasons, really, one of them being that his brother had just left him and he was now alone in the business; and, number two, that his wife was very sick and he wanted to take it easy.

Q What did you pay, the purchase price, for Beacon; what was it?

A Inventory.

Q Is Mr. Klein now working for you?

A Yes. He also got a five-year contract, and since then has had a second five-year contract which he is working in.

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Q Can you describe to the Court, please, where the source of most of the dental products that you sell in Interstate Drugs is? From where do you get most of those products?

A Directly from manufacturers.

Q There has been some testimony in this case that dental dealers of the category presumably that Beacon is as opposed to a mail order house like Interstate Drug maintain large backlogs of items.

Does that comport with your understanding of the two types of companies, mail order as opposed to the other?

A No, I would guess that mail order companies maintain larger stocks than a regular dealer, locally.

Q How much larger? Is there a particular monthly inventory figure?

A We maintain 60 to 90 days.

Q What is the reason for that?

A Well, when we receive an order, we are ordinarily prepaid and our customers expect to get the merchandise. If we don't have it, we create a back-order situation. It is our experience that wholesalers and dealers will mark an item out and instruct the customer to reorder it or usually a physician will have more than one source of

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supply, you know, and he will go to the second source.

Q Mr. Sandler, when you last were in court testifying, you indicated that percentage of business obtained from dentists, dental laboratories, and so forth, in the Metropolitan New York area was increasing for Interstate Drug.

Is there a price reason that is related to that increasing sales?

A Yes. We are ordinarily cheaper.

Q By how much?

A I don't know. That would be hard to say. But I would say this: It has been our experience that a retail store or a retailer must work a 30% to 40% gross margin, and we work on significantly less than that.

Q How much less than that?

A We are working between 15% and 20%, ordinarily.

MR. DeMARCO: No further questions.

THE COURT: Is the principal price advantage that the mail order house has that they don't pay a salesman's commission or salary?

THE WITNESS: That is a fallacy, your Honor.

THE COURT: Really?

THE WITNESS: Yes. That is a fallacy, because we spend about four to five hundred thousand dollars a year

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for advertising, which is our salesmen.

The real reason that we can operate more cheaply is that we are operating on an assembly- line basis, and a great deal of volume, frankly.

THE COURT: So the greater the volume, the more you can afford to take a lesser mark-up?

THE WITNESS: Yes, that is the general rule.

THE COURT: But you think the expense for advertising offsets the expense of salesmen?

THE WITNESS: Well, with four or five hundred thousand dollars you can hire a lot of salesmen.

THE COURT: I understand.

All right. Mr. Sirignano?

RECROSS-EXAMINATION

BY MR. SIRIGNANO:

Q Mr. Sandler, approximately how much of Interstate's sales are outside the Metropolitan New York area, presently?

A I would just -- I can look at some of these figures and give you a pretty good estimate, if you will give me some time.

Speaking strictly about New York State, and we had said we equate New York State to the New York Metropolitan area, on one of these it is 15% -- that means 85% of our business would be outside. This one is about 12%. I

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would guess between 10% and 15% of our sales are in the Not York Metropolitan area, and 85% to 90% are out.

Q Beacon, in addition to making sales direct to dentists and dental laboratories, also operates as a jobber, doesn't it?

A You would have to define this jobber thing a little bit. It may mean one thing to me and another to you.

Q It makes sales to other dental dealers?

A Yes, it does.

Q In fact, don't sales to other dental dealers represent a major portion of its total activity?

A Yes. Sales to Interstate Drug would be the major portion of its business.

Q But it also sells to other dental dealers?

A Yes, it does.

MR. SIRIGNANO: No further questions.

THE COURT: Thank you, Mr. Sandler.

You may be excused.

(Witness excused.)

THE COURT: All right, what next?

I take it the defendant rested and now we are at the stage where, if anything, the government has rebuttal.

MR. JINKINSON: That's right, the defendant rests.

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MR. LUBLINSKI: Would you please call John Wikoff.

J O H N W I K O F F, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUBLINSKI:

Q What is your address, Mr. Wikoff?

A 313 Swan Creek Road, Oxon Hill, Maryland.

Q By whom are you presently employed?

A The United States Census Bureau.

Q And inwhat capacity is that?

A I am Assistant Division Chief in the Business Division for Census Programs.

Q How long have you been with the Bureau of the Census?

A A little over nine years.

Q What are your basic duties and responsibilities with the Census?

A Well, I have responsibility for the planning and implementation of the quinquennial censuses of retail trade, wholesale trade, and selective service industries, part of the quinquennial economic censuses.

Q Mr. Wikoff --

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THE COURT: Wait. I hate to be ignorant but what is quinquennial?

THE WITNESS: Five-year period.

THE COURT: All right.

A Actually, the censuses were previously conducted as authorized by Congress, roughly at five-year intervals, and they have now been formalized to cover years ending in 2 and 7. And the censuses are conducted the following year, so that they will have financial economic sales payroll data such as this for the calendar year.

So the censuses are actually conducted in the following year, for instance, years ending in 3 and 8.

THE COURT: So we will have a census during 1973?

THE WITNESS: Yes, there is a census in process at this time.

THE COURT: Which will be based on 1973 figures?

THE WITNESS: 1972 figures.

THE COURT: Oh, 1972 figures.

THE WITNESS: 1972 figures.

THE COURT: So you are now asking business establishments for their returns for the calendar year 1972?

THE WITNESS: Actually we are reviewing and tabulating the data at this time.

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THE COURT: But you have already?

THE WITNESS: We have collected the data.

THE COURT: For the calendar year 1972?

THE WITNESS: For the calendar year 1972.

THE COURT: And then as soon as the work is completed, it will be published?

THE WITNESS: Yes. As a matter of fact we started yesterday putting out press releases on a state basis. However, these do not have nearly the standard industrial classification or kind of business detail that the detailed reports will have when they are issued later.

These are initial summary data to get some broad aggregates out to the public.

THE COURT: And after the material that is published this year, we will get another similar material in 1978 for the calendar year 1977?

THE WITNESS: That is correct.

THE COURT: All right.

THE WITNESS: Actually there are so many census publications covering so many kinds of business, so many geographic areas, and presenting so many facts from the census, that the publication program lasts for about two years. In fact, during the five-year cycle we are either planning the next census, implementing or publishing the

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last one.

THE COURT: Tell me, the Bureau is in what department?

THE WITNESS: In the Department of Commerce. It is now part of the Department of Commerce's Social and Economic Statistics Administration, which includes the Brueau of Economic Analysis,formerly the Office of Business Economics, as a result of a recent reorganization.

BY MR. LUBLINSKI:

Q Mr. Wikoff, when was the last census of business conducted for which data has been published?

A It was conducted in the year 1968, covering the year 1967.

Q I am going to show you Defendant's Exhibits F and G in evidence, and Plaintiff's Exhibit 20.

I show you Defendant's Exhibits F and G in evidence and Plaintiff's Exhibit 20.

Would you examine them, please?

Mr. Wikoff, are you familiar with the tables represented in those exhibits?

A Yes, I am.

Q Would you please tell the Court how the Bureau of the Census goes about gathering the data that is represented in those sales?

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A Well, of course, I could spend the day or I can try to condense it into a couple of minutes.

Basically, the mailing lists, which is the key to the economic censuses, consist of the previous census and the records of the Social Security Administration and the Internal Revenue Service.

Every employer, a company in the United States, with a few exceptions which are not pertinent, have employer identification numbers for payment of federal income tax or withholding in payment of federal income tax and Social Security tax.

And the Social Security Administration assigns a preliminary classification code, which they use both for their own limited statistical programs and to assist the Census Bureau.

Based on this code, we determine which form should be sent the company that is pertinent to his type of business.

Now, based upon the records from the last census, the previous census, we know which of these companies operated more than one business establishment, and we have their employer identification numbers also.

So we conduct what we call a pre-canvass in which we ask every company to review the list from the previous

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census, the list of establishments, primary kind of business and address, and we ask them to update this list, deleting any establishments that have been sold or closed, adding any new establishments.

We have each of these matched to the employer identification number. There may be any number of establishments under that one employer identification number.

We then maintain this as a separate list and eliminate the employer identification number from our list to be mailed as presumed single units.

And then we mail the two groups, the known, what we call multi-units, and the presumed single units.

We select the appropriate report form, based upon their previous economic census standard industrial classification code assigned to them by the Social Security Administration.

Many of the presumed single units will be found to be multi-units, and the census report form that is furnished them provides this information for so advising us if they operate more than one establishment.

And then in the new census they would be identified -- each establishment would be identified separately and it would go on likewise into the next census.

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Now, this is a very brief summary.

I also mentioned the Internal Revenue Service. We use the employment and payroll data from the Social Security Administration, which we receive on computer tapes.

The first quarter employment and first quarter payroll, together with receipts data from the tax form, basically on the basis of editing the census reports to see if there are any glaring differences that need to be investigated.

We also use these data for editing, as I say, the data to see if there is anything that needs to be investigated and for purposes of imputation of delinquents.

Now, reporting in the census is mandatory, and we have a very extensive follow-up program. Most respondents are contacted if necessary sometimes five or six times, but as a practical matter it will be a few small companies from whom census reports are not received.

This may be because they have gone out of business during the year or for some reason we cannot contact the company.

Quite often these result in Postmaster returns. So, as is necessary in any statistical program, we provide for imputation in order to get complete coverage.

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So if we are unable to obtain a census report for any reason, valid or otherwise, we use the data from the Social Security Administration on employment and payroll.

If possible, we supplement this data with sales data obtained from the tax return. If it is not possible, we use whatever is available, and estimate the other data.

For example, if we were able to obtain only employment and payroll we would estimate receipts data. It is estimated that in total this accounts for only about 5% of the census data that are obtained from these back-up sources, as I like to think of them.

THE COURT: What is imputation?

THE WITNESS: Well, it is a term that -- the word "impute" I think means to allocate or infer to, but we use it in the Census Bureau, and I suppose all statistical agencies, to calculate statistically rather than to have the actual data. Actually perhaps a better term would be to estimate. But sometimes the estimation is based upon records of other statistical agencies or other agencies such as IRS and Social Security; sometimes it is based upon the parameters from like companies in like kinds of business of like size, from previous censuses, or what they call a hot deck approach, using data from the current

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census.

I don't mean to over-emphasize this point, because the imputation in total for the census of wholesale trade amounts to only about 5% of the total sales, but I wanted to bring it up to emphasize that this is done in order to get complete coverage rather than having data only for those for whom reports were actually obtained.

THE COURT: That is to take into account the delinquents?

THE WITNESS: Basically.

THE COURT: Those who failed to report?

THE WITNESS: It is for the delinquents.

THE COURT: So ineffect you impute to them a certain volume?

THE WITNESS: That is correct.

THE COURT: And as you used the term "establishment," what does that mean? A single place of business?

THE WITNESS: A single place of business. One firm may operate several establishments in many geographical areas. Each establishment of a company reports separately in the census. The parent company is held responsible by the Census Bureau for completing or having the census forms complete. We do not go to the individual business establishment; we go to the parent company, which may be in

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the hierarchy of the company several steps higher; if we have several steps of subsidiaries we go to the top of the corporate structure in the case of a corporation.

But there is a census report form completed for each establishment in each kind of business, which is in scope of the economic census.

There are some economic activities which at the present time are not in the scope of the economic censuses but all of wholesale trade, retail trade and services, manufacturing, mining, and construction are in the scope of the census.

THE COURT: Just as an example, then, if you were to take Sears Roebuck, every Sears Roebuck store would be a separate establishment?

THE WITNESS: Every store would be a separate establishment.

In addition, any manufacturing location which they might own, any service location which they might own or any auxiliary location would be a separate establishment.

For instance, if the company operates a warehouse serving its operating retail or local sale establishments, this auxiliary location is separately classified. However, these auxiliaries are not part of the census of wholesale

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trade. They are in a separate census.

THE COURT: I suppose part of the reason for that treatment is that you construct your figures on geographical bases?

THE WITNESS: That is correct.

THE COURT: So that unless you had them broken down by separate establishments,you wouldn't be able to relate the information to geographical area?

THE WITNESS: That is correct. In New York City, for example, would be overloaded because of the number of companies that are headquartered in New York, and there would be no relationship between the census data and the geographic area.

THE COURT: I understand.

Q How are the questionnaires that you send out to these various companies formulated?

A In planning for the census, we contact known interested parties. Typically we will send them a copy of the report form soliciting any recommendations, criticisms, or complaints that they might have asking for recommendations for the design of the form for the new census. Interested government agencies which use census data, trade and professional associations, are the organizations contacted most extensively in this.

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Q I show you Plaintiff's Exhibit 50 in evidence. Is this one of the census questionnaires sent in 1967?

A Yes, it is. This is the report form which was sent to a variety of -- I won't even say related businesses, perhaps contradicting the form in saying that I won't say that, there are about sixty or seventy different report forms used in the censuses under my jurisdiction, the census of retail trade, wholesale trade, and selective service industries. The figure 25 for the 1972 census-- I can't remember how many different report forms there were in 1967; however, it is roughly the same, approximately 25 different report forms, and these are grouped according to related standard industrial classification or related trades.

Now, sometimes these related ones are more arbitrary than truly related, but it is to keep from endlessly proliferating the number of forms and also the smaller number of forms that we can have-- the smaller number of forms, I feel the better the reporting, in one sense. On the other hand, it confuses the respondent. If he gets a form that goes on for 15 or 20 pages -- and we have none like this-- it becomes difficult to follow the form. But the more options he has, at least theoretically, the better

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he should be able to provide data.

Because we are going to have, for example, in the case of products, we are going to list his products, and where I feel we are going to get better reporting.

On the other hand, we have to strike a balance between the number of forms, the detail of the tailoring of the form to the kind of business, and the burden on the respondent.

So, as a practical balance, we have approximately 25 different report forms for wholesale trade.

This is the report form which was sent to standard industrial classification 5086, which is professional -- I better check-- professional equipment and supplies, and that classification is one of several which were sent this particular report form, and that particular classification was sub-classified into several sub-classifications of standard industrial classification 5086.

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Q Now, when you received responses from the companies surveyed, how were those responses evaluated and finally tabulated to the point where they could be represented in tables appearing in census publications?

A Well, each individual census report form had a computer program written. The report forms were clerically screened to see that the data were in the correct boxes and the data were properly reported in the right units, basically, that the report was in shape that it could be keypunched and go to the computer.

If there were any comments or write-ins or remarks on the form, they went to one of our analysts to make the necessary determination.

For example, a report form which went to a grocery wholesaler, the form would not have had a line on it for automobiles, for example, or for automobile parts, so if he had received a wrong report form or if he was diversified to the extent that he had automobile parts, he would presumably have had to write this particular commodity in because the form would not have provided for it. This would have been assigned a necessary code in the commodity classification before it went to keypunch. Then each form went through a computer program which had been designed for internal consistency and based upon the data on the report form,

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including the class of customer and the product sold and the kind of business that the respondent himself indicated he was engaged in, a final standard industrial classification was assigned to the establishment report.

Q I call your attention to Defendant Exhibit F in evidence, which I showed you previously.

What does the entry for commodity line 511 on that form inform us?

A Well, I'd like to put this in context just a little bit.

The basic structure of the census and perhaps I should have included this in my general explanation of the census, is to classify each business establishment based upon one of the standard industrial classifications, what we call an SIC code.

Every economic entity has a standard industrial classification code. Even the government itself and households have standard industrial classification codes.

The basic code of an establishment is this standard industrial classification code, which is -- the system is maintained by the office of management and budget. Many government statistical agencies and private organizations provide input for this, but this is a system that is used by all government statistical agencies and even non-government

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agencies. Modifications of this, for example, are used by Dun & Bradstreet and other organizations.

But this table is not based upon the standard industrial classification, it is based upon the products or commodities sold by the establishment rather than the standard industrial classification. This table says that there were 702 establishments selling dental equipment and supplies and that their sales of dental equipment and supplies were 315,854,000.

Q Now I call your attention to Defendant Exhibit G in evidence.

What does the entry for commodity line 5110 represent there?

A This entry is only coincidentally, not entirely coincidentally, the same as the other table. It represents the number of establishments classified in SIC 5086 which were selling dental supplies and equipment and their sales of dental supplies and equipment.

Now, this indicates that there was a very, very high concentration of firms selling dental equipment and supplies in SIC 5086.

To put it another way, grocery wholesalers weren't selling dental supplies and according to these data we did not receive a single report form from a wholesale establishment

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which was classified anywhere except standard industrial classification 5086 which sold these commodities.

Now, again, in clarifying, these data are based upon the data for establishments reporting their commodity lines. Now, just as we have some establishments for which we have to input data for whom we don't get reports at all, there are these establishments plus a few others for whom we do not get good commodity line data. They either don't understand it or botch it up, shall I say, or they simply don't complete this inquiry.

For the substantial ones we will try to get this data, but there are going to be a few companies for which these data are not available, so this figure of 702 and the figure of 315,000,000 is expanded to a hundred per cent basis based on the data for the respondents. It is, of course, done with accepted statistical techniques.

In other words, we did not have, I'm sure, 702 establishment reports that provided these data and they did not account for 315,000,000, but it was based upon the data for those which did report the line.

Now, in the aggregate, in the aggregate, 65 per cent of the receipts were broken down by commodity line. The data for SIC 5086 are not separately available as to what the per cent was for that classification. For the

previous census it was about 85 or 86 per cent and that's what it runs for most kinds of business, about 85 per cent of the receipts are reported by commodity line.

I don't know if I am making myself clear here. What I am saying is the other 15 per cent is imputed. It is simply divided between the commodities on the same basis as the 85 per cent that reported. We assume that they have the same characteristics as the 85 per cent and statistical research by the bureau has proved that this is acceptable technique.

The alternative would simply be to report it incomplete and we feel this is statistically far more accurate than simply leaving the data out and that is the only alternative.

Q Turning to Plaintiff Exhibit 20 in evidence, the entry for dental equipment and supplies, what does that represent and how does that differ, if it does, from the entries on the other two tables?

A Well, these are the 655 establishments which were of the SIC 5086, which is a formal standard industrial classification assigned by the office of management and budget. This is a subclassification assigned by the census bureau.

We subdivided this classification into five subclassifications, one of which was dental supplies, the merchant

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wholesalers selling dental supplies.

This is the number of those establishments classified in SIC 5086 which were subclassified dental supplies. Now, this figure is 655. Since the other figure was 702, that indicates that there were a few establishments also classified in SIC 5086, professional equipment and supplies, which were selling dental supplies.

As I had indicated earlier, we apparently received no census report for an establishment not classified in SIC 5086 who had reported any commodities in the dental supply and equipment category, but we did have reports from establishments classified in 5086 but not subclassified as dental. For example, they may have been surgical medical and hospital. I suppose that is the most logical. But they had some sales of dental supplies and equipment, so that's the reason that those figures are different.

The 655 are those which are primarily dental and which were assigned that establishment classification and subclassification.

Now, the sales here in the second column of 314,000,000 includes their sales not only of dental supplies, but of non-dental supplies. It is their total establishment sales, not just their sales of dental supplies.

The purpose of this particular table is not to show

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the sales by commodity but only the total sales of establishments in that classification. The other tables that we were looking at were based upon the commodities or products sold.

Q I notice, Mr. Wikoff, that all three tables, Defendant Exhibits F and G and Plaintiff Exhibit 20, describe sales by merchant wholesalers.

What is the census definition of that term?

A I could refer to the text for the actual definition, but this is one of several types of operation, as we call it, in which wholesale establishments are subclassified.

Now, wholesaling, according to the standard industrial classification, includes not only merchant wholesalers, it includes sales branches and agents and brokers. There were a couple of subclassifications in the '67 census which are not pertinent to this at all which are no longer separate types of operation. But basically a merchant wholesaler in the sense it is used in the census is a business establishment which is not acting as an agent for a manufacturing plant or which would be a sales branch or in an agent or brokerage capacity, he is taking title to the goods and reselling it. He may or may not carry an inventory.

Now, for some purposes this is subclassified and the subclassifications appear on the report form. However,

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there are no census, published census data which break these down into the subclassifications which appear on the report form.

For instance, on the report form we have supply house, importer, exporter, dealer, distributor or wholesaler. Well, dealer, distributor or wholesaler is a rewording. You notice it has the same code as the supply house itself. But these data would include all of these subclassifications.

If the merchant or the seller takes title to the goods in contrast to acting in an agency capacity, then he would be included in this type of operation subclassification, which is what we have here.

Q Mr. Wikoff, you are saying that all three of the exhibits that you have before you would include sales by any business classified as a supply house, as an importer, exporter or wholesaler or jobber?

A Yes. Supply house is not the classification, we call them merchant wholesalers because of the fact that they take title to the goods and it would include an importer or an exporter.

Q Now let me ask you, were an importer to make a sale of dental products to a dealer or to a supply house and then that company would, in turn, sell the same exact product to professional users, how would that information

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be represented in these tables that you have before you?

A If each establishment was classified in 5086, they would both be included in the 655 establishments, regardless where they were classified, they would be included in the 702 establishments in the sales figures.

Q So all these charts, F, G and 20, could readily show sales figures representing duplicate sales?

A That's true. These tables do not show any data on sales by class of customer, it is simply the total sales of the establishment, and they could not only be duplicated, theoretically they could be shown three or four times.

Q I believe you mentioned previously that a company identified on one of these charts that had a certain number of outlets nationally, let's say 12, would be represented as 12 establishments in this chart, is that correct?

A Yes, it would be, at least in the national figures, and these are national figures we have in front of us. It would show as 12 establishments.

However, the sales, even if sent from one establishment to the other, these are not sales. Intercompany transfers are not included in sales. These will not be duplicated.

For example, if a New York location sent merchandise to its Chicago establishment, this would not be a sale even

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if the company handled it accountingwise as a sale. They are instructed not to report intercompany transfers as sales. However, if it was a non-affiliated company it would be a sale.

Q Is there any way you can ascertain from these tables how many independent companies responded to the census questionnaire as making sales of dental equipment and supplies?

A How many independent companies?

Q Yes.

A Responded to the questionnaire on which these data are based?

As I indicated earlier, it's approximately 85 per cent. These data are based on the actual reports from establishment reports representing about 85 per cent of the sales and both the sales figure and the number of establishments are statistically expanded to a hundred per cent basis based upon the number of establishments actually reporting the data, and aside from the fact that the data are based on approximately 85 per cent of the receipts actually reported by what we call commodity or product line, I do not have access to any figures and to the best of my knowledge they have not even been tabulated as to show how many actual establishments and certainly not how many firms. That would require a special tabulation.

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Q Perhaps I phrased that question incorrectly.

Looking at the three exhibits before you, they show 702, 702 and 655 establishments, respectively.

Now, were one company to have ten outlets, you did say that that would appear as ten establishments?

b3 A That would appear as ten establishments.

Q I show you Defendant Exhibit A in evidence, and ask you to look at that.

A Yes.

Q Are you familiar with the information contained in those tables?

A Yes, I am.

Q Do they represent a breakout of any of the other tables you have been looking at?

A Yes. Thistable is a comparable table to Exhibit G. Exhibit G provides the data by commodity for merchant wholesalers in this classification for the U.S. as a whole. This table Exhibit A provides comparable data for the New York standard consolidated area, which I suppose has already been defined.

Again, this standard consolidated area is based upon definition set forth by the office of management and budget. I suppose it's -- I can't quote the counties that are included, but it is the New York SMSA, Suffolk, Nassau,

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two other New York counties and northern New Jersey. I suppose that is in evidence, what it consists of. However, I have it in the publication if you want to find out what it does consist of.

THE COURT: I suppose it is the same as what is called the New York metropolitan area.

MR. LUBLINSKI: Correct.

A It includes Westchester and Rockland County as well as Nassau and Suffolk and New York City, it includes three northern New Jersey SMSA's, Newark, Jersey City, Passaic, Clifton and two other smaller counties. But this is defined by the office of management and budget as consistent for all government statistics.

There are only two standard consolidated areas, New York and Chicago.

THE COURT: Aren't there eight New Jersey counties?

THE WITNESS: I was quoting SMSA's.

THE COURT: What is that?

THE WITNESS: Standard metropolitan statistical area.

This is simply an expansion of standard metropolitan statistical areas. It includes New York, as I say, these three New Jersey SMSA's plus several other counties.

For New York and Chicago these standard consolidated

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areas have been defined. In 1967 there were 230 standard metropolitan statistical areas. In addition, there were two standard consolidated areas, New York and Chicago, which is simply a larger geographic area consisting of several lesser SMSA's and counties, and that is what this covers.

If you would like me to verify, I can verify the actual counties involved here.

Q It is not necessary.

A But it is the official standard consolidated area.

Q The data represented in Defendant Exhibit A, that refers to the same sales by the same merchant wholesalers we discussed previously?

A Except it is restricted to those merchant wholesalers located in the standard consolidated area of New York and northern New Jersey, so we see here of the 702, and it is directly related to the 702 figure, not the 655 -- I hope I made it clear what the difference of these figures are.

The 655 is the number of establishments classified in the dental equipment and supplies subclassification. The 702 is the number of establishments that sold dental equipment and supplies. This means that there were 47 additional establishments, and I am using this term loosely, because, as I explained earlier, this is not the actual number for which census reports were -- it is the derived

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figure, so there were an additional 47 establishments which were not classified as dental equipment and supply merchants but which sold this commodity.

Q The figures set forth in table 20 similarly reflect duplicate sales were an importer to make a sale to a dental dealer who, in turn --

A Excuse me. You said table 20?

Q I am sorry. Referring to Defendant Exhibit A, would that similarly reflect duplicate sales?

A Yes, it would. It is exactly comparable to the figure of 702. There were 118 of the 702 located in the New York SCA.

Q Looking at this table, can you ascertain from the information contained therein in what geographic area the sales of dental equipment and supplies represented were made?

A I can ascertain the geographic area in which the wholesalers were located, I cannot ascertain the geographic location of the customers. Those data are not on the report form.

THE COURT: And it doesn't mean that all the sales reflected took place in the standard metropolitan consolidated area?

THE WITNESS: It means that the point of sale as distinguished from the point of purchase, if you can make such

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a definition, was in the New York SCA. However, it may have been shipped out of the area.

THE COURT: Of course.

THE WITNESS: It does not mean that the customer is in the area. They could even be selling by mail. It is the sales of the establishments in the area. It says nothing about the location of their customer.

Likewise, it says nothing -- or conversely, it says nothing about the purchases from outside the area. It does not purport to do this.

In other words, it does not include any sales made from outside of the New York SCA into the New York SCA, it is simply based upon the location of the seller.

Q Mr. Wikoff, would it have been possible for the plaintiff in this case, or any other interested party, to obtain a special tabulation from census showing sales made to dentists, laboratories, institutions and government agencies in metropolitan New York?

A Located in metropolitan New York?

There are no data collected, there is no question on the report form based upon the location of the customer so nothing could be tabulated on a special basis which was not included on the report form.

The report form inquiry on class of customer was

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on the same basis as the rest of the form based upon the location of the -- based upon the seller rather than the purchaser.

MR. LUMLINSKY: No further questions, your Honor.

THE COURT: All right, cross-examination.

MR. JINKINSON: May we have a few minutes, your Honor?

THE COURT: All right. Do you want to take a short recess?

MR. JINKINSON: Yes, please.

THE COURT: All right.

(Recess)

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Q Mr. Wikoff, I have three or four questions to ask you, which I hope are not framed for the purpose of impugning the accuracy of the procedures underlying the figures of the census of wholesale trade.

In fact, it was the defense that brought the census estimate of $55 million of wholesale dental sales in the New York area to the attention of the Court, for the purpose of confirming the fact that the plaintiff's estimate of the market was far too low.

My questions are designed to elicit the true wholesale level of the market in question, which is the wholesaling of all products used in the dental practice.

Now, calling your attention to your published figure in Plaintiff's Exhibit 20, which I believe you have in front of you, the figures in your Exhibit 20 show that there were 655 dental merchant wholesalers with $314 million of sales in 1967.

Can you tell me whether that figure represents the total sales of all merchant wholesalers classified as dental dealers?

A Yes, it does.

Q In other words, did all such dental dealers report their sales to the Census Bureau fully?

A Would you rephrase that?

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Q Well, in other words, did all dental dealers, the 655, report their sales to the Census Bureau fully?

A Well, they are required by law to.

THE COURT: Your assumption is that they did?

THE WITNESS: My assumption, yes, that they obeyed the law.

THE COURT: But you can't tell, you don't know whether they did or not?

THE WITNESS: No. All I can say is that the report form provides for their providing their total sales, and this is their total sales without regard to the product or commodity, and we edit the data to see that it is reasonable in terms of their payroll and employment, and in terms of what they reported to Internal Revenue Service.

Q I thought you meant an adjustment for non-reported sales?

A I am talking about reporters now.

As far as the non-reporters, as I indicated earlier, this probably-- I don't have the figures for this particular classification,but it is typically around 5% for non-reporters.

Now, I hope this isn't creating confusion on the 15% figure I quoted earlier.

Q There is really some confusion with me.

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A Okay. The 5% and again this is a rough figure -- are those from whom we do not get reports at all. No report. So we had them in our mailing list, we were aware of their existence. So we lift their data from IRS and Social Security, or use data from those agencies as a basis for imputing or estimating their data.

Now, if we are forced to get the data from this source, we of course do not have access to their sales by commodity or product line.

Now, in addition to the 5%, and this 5% is an estimated figure-- it is not an actual figure for this kind of business-- in addition to this 5%, some of those who actually report in the census do not provide good data on their product or commodity line, and this is the reason that I said there is approximately 15% for whom we do not have data by commodity line.

Q In other words, I understand your testimony -- and maybe I didn't understand it correctly-- that the figure contained in Exhibit 20 did include an adjustment payment?

A It does, it does.

THE COURT: He took the 5% and made an imputation, and then as to the product lines he took the 15% and distributed that 15% in sales volume amongst the product lines

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in accordance with the 85%?

THE WITNESS: Yes.

Q And then came up with the figure published?

A Well, of course the product lines has nothing to do with the figure that I have in front of me, the 655 establishments and the 314 million.

We get into the product line only when we get into these other data. You see, these 655 are those establishments which are classified as dental supply wholesalers.

Q Then the amount you published--

A We may not even have information about their commodity lines.

Q The amount you published there, the $314 million for the 655 people, is precisely what they reported, is that what you are telling the Court, with no --

A For those that did report, yes. This includes the imputation.

Q Oh, it includes that?

A It includes the imputation, yes.

Q Well, now, including the imputation, isn't it more likely that you would be lower than higher in your estimate?

A No. We would impute the higher. We may find in a

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post-censual study that we imputed a little too low or a little too high, but I do not recall any or have access to any information on the imputation.

But if we had expected it to be higher or lower, we would have used larger or smaller imputation factors. So I can't assume that.

And of course we use data from other sales of the product where those data are available.

Q Let me ask you this question. There has been evidence that if the total mark-up for dental equipment supplied remained at the consumer level, and from the output side, for example, adding a 50% mark-up to the $300 million of dental equipment and supplies produced at the manufactures level, we get a national wholesale market between $450 million and $481 million.

Would that constitute a reflection on your published figure of $315 million?

MR. LUBLINSKI: Objection, your Honor.

THE COURT: Well, I think it is objectionable as to form, but suppose we take it, and I will consider it as going to the weight to be given to it, if the witness can answer it.

A Well, in the first place, let me make an observation that all of the figures, as we have already covered,

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are very close.

You would be better advised, in my opinion, to use the $315 million, which was with the 702. I am bringing this out only to make sure there is no misunderstanding here. The 655 is the number of establishments in this classification. It includes their sales of other commodities.

Now, when we go to the other concept where we are basing the data on the commodities sold, the 702 establishments, their sales are based upon the commodity or product sold. But since we are only talking about a million dollars, I won't -- it is not really important.

But conceptually the 314 is not restricted to dental supplies and equipment. The - the 314, rather, here -- with the 655 establishments, the 702 establishments and the 315 figure is total dental supplies and equipment.

Now, as far as the reflection on the data, I think I need to stress that the census is based upon an establishment basis, and it includes only the sales of what we call and have defined earlier as merchant wholesalers.

It would not include any sales made by any other type of establishment. It would not include sales by agents or brokers, although we have some limited data on this.

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It would not include sales directly by manufacturer. And I do not work with manufacturer statistics and I can't tell you what they have available.

But I wouldn't be surprised at all if I were told that manufacturers sold a substantial percent direct to large institutional purchasers.

So I would say that this would be a possible explanation of the difference, and not a reflection on the census data or a reflection on the figures that you have compiled.

Q Mr. Wikoff, the concept of wholesale sales, as a middleman function, is essentially more difficult to define statistically than the concept of output at the manufacturer level or the concept of the consumer, isn't it?

A I don't know that it is conceptual, as far as defining it, but as far as collecting and tabulating the data, I would say it is, because of the duplications that we discussed earlier and the fact that wholesale sales do not have to be made by a wholesale establishment, and these are serious-- a potentially serious limiting problem.

Q Do you have some kind of a formula or method by which you can allocate the sales, national sales, into

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the New York area?

A Well, we have no need to, because we actually -- oh, do you mean based upon the purchaser's location?

Q Yes.

A We don't get into this at all. We have no data that even purport to indicate the location of the purchaser.

Q There has been an estimate in evidence in this case that the national market is about $450 million.

MR. LUBLINSKI: Objection, your Honor.

Q Doyou have any method--

THE COURT: Wait.

What is it you are objecting to?

MR. LUBLINSKI: I am objecting to the fact that this witness is a representative of the Bureau of the Census and he is requested to testify as to the manner in which the Census has compiled the figures represented in various exhibits presented by defendant and plaintiff.

He is not an expert in these areas wherein defendant's counsel is attempting to have him validate methods used by other witnesses.

THE COURT: I will permit it. Let's start over. The objection came in the middle of the question.

Q All right. Mr. Wikoff, I just started the

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question. I will repeat it.

There is in evidence here a fact, the fact, that the national market for the sale of dental supplies and equipment is about $450 million.

What methods would you use to determine percentage of those national sales allocable to the Metropolitan New York market?

MR. LUBLINSKI: Your Honor, I have to object to the form of that question.

THE COURT: Why?

THE WITNESS: I don't think the objection is necessary, because I can say I don't feel qualified to answer it.

THE COURT: All right. So that is --

THE WITNESS: That is a question I feel for an economist dealing in the market of the particular product, and I would have my ideas on it but I wouldn't qualify myself as an expert at all.

THE COURT: At any rate, the Bureau of the Census doesn't attempt it?

THE WITNESS: No, the Bureau of the Census does not attempt it.

THE COURT: That is what I understood.

All right, let's go on.

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Q Would it be a fair question to say, referring to Exhibit 8, that almost all of the 118 establishments are dental dealers?

A Yes, it would be.

MR. LUBLINSKI: Objection, your Honor.

What is the definition, what is a dental dealer?

MR. JINKINSON: I have my answer to that.

No further questions.

THE COURT: What is the--

Does dental dealer have a meaning as far as the Census Bureau is concerned, Mr. Wikoff?

THE WITNESS: Not a technical meaning, no.

THE COURT: How did you interpret the question?

THE WITNESS: I interpreted the question to mean a merchant wholesaler, including all of the sub-classifications that we discussed earlier.

If I could add a comment on that, I said that I felt it would be a reasonable inference. It cannot be conclusively statistically proved from the tables.

THE COURT: All right.

THE WITNESS: But I do feel it is a reasonable inference.

MR. LUBLINSKI: No redirect, your Honor.

THE COURT: All right.

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MR. JINKINSON: Your Honor, I want to ask Mr. Wikoff this question.

BY MR. JINKINSON:

Q What is the percentage of the 118 dental dealers shown in Exhibit A and the 655 shown in Exhibit 20?

MR. LUBLINSKI: Objection to the form of the question.

THE WITNESS: Well, I am going to--

THE COURT: Wait.

Let me see if I can understand it.

What are the two exhibits?

MR. JINKINSON: A and 20.

THE COURT: All right.

May I see them?

MR. JINKINSON: In 20, your Honor, there is a list of the 655 dental dealers in the entire United States.

In A there is a census figure showing there are 118 dealers in the Metropolitan area, the trade area.

THE COURT: I see under "Professional Equipment and Supplies" in Exhibit 20, I see dental supplies, 655, and on Exhibit A I see --

MR. JINKINSON: It is in the right-hand column, your Honor.

THE COURT: -- Dental Equipment and Supplies--

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THE WITNESS: Those tables are not comparable.

THE COURT: 118?

MR. JINKINSON: 118, isn't it?

THE WITNESS: 118.

THE COURT: 118. All right. Now, what is the question?

MR. JINKINSON: Well, the question is, what is the percentage of the 118 to the 655? Wouldn't that be a reasonable way to allocate the percentage of nationally sold in the market?

THE COURT: I think I will sustain the objection as to that. You mean you want him to calculate what the percentage of 118, of 655 --

MR.JINKINSON: I am asking. If I did that, wouldn't that be a reasonable way to determine the amount of national sales within the New York Metropolitan area?

THE WITNESS: Well, I think first we should point out that the comparable table to Exhibit A, which is the data for the New York SCA, as the Exhibit G, which has the 702 establishments and 315, the difficulty being here that this includes the additional 47 establishments which are not in that classification, and these two are comparable.

Q And you--

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THE COURT: Wait. The reporter has to get this and we are interrupting.

All right, let's start over.

A Now, if I may --

BY MR. JINKINSON:

Q Please use Exhibit G, then, instead of 20.

A All right.

Q Wouldn't it be a fair way to estimate sales of the national amount shown on G within the New York Metropolitan area by taking the percentage dealers as compared to the number of dealers shown in G?

MR. LUBLINSKI: Objection, your Honor. My objection is based on the fact that counsel persists in characterizing these sellers as dealers.

The witness has already stated that the term "dental dealer" doesn't mean anything in the census. The relevant term is wholesalers.

While the term "dental dealers" does have a specific meaning, in the context of this litigation --

THE COURT: Well, I don't think we need to get into that. I will sustain the objection.

You can make the point to me in argument, but Mr. Wikoff did not come here and wasn't qualified as a statistical expert. He came here, as I understand it, to

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explain how the Census Bureau operates and to shed light on the techniques for producing these figures.

All right. Anything else?

MR. JINKINSON: I have nothing further.

THE COURT: Anything else?

MR. LUBLINSKI: No redirect, your Honor.

THE COURT: Thank you, Mr. Wikoff.

You may be excused.

(Witness excused.)

THE COURT: What next?

MR. SIRIGNANO: I would like to call Dr. David Schwartzman to the stand, please.

D A V I D S CH W A R T Z M A N, resumed:

DIRECT EXAMINATION

BY MR. SIRIGNANO:

Q Dr. Schwartzman, I believe you already testified as to your background in the field of economics.

Will you tell me what background you have in the area of statistics?

A I've taught courses in statistics, in the Economics Department at the New York University and at the New School. And in my research --

MR. JINKINSON: Your Honor, I can't hear the witness. He is not speaking loud enough.

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THE COURT: All right. Talk up.

A In my research work, as an economist, I have made a great deal of use of statistical techniques, of analysis, and I have used data that are submitted by government agencies, including the census of manufactures and the census of business.

My study of retail trade, the book that I published, made a great deal of use of Census of Business Data.

It was based on Census of Business Data.

Q Have you had an opportunity to read the testimony of defendant's witness, David Ellis?

A Yes, I have.

Q Have you had an opportunity to read the transcript of the testimony of defendant's witness, Dr. Jay Gould?

A Yes, I have.

Q Have you examined exhibits which were introduced by defendants in connection with those witnesses?

A Yes, I have.

Q Dr. Schwartzman, had you at the outset of this case been requested to conduct an investigation with respect to ascertaining position in the relevant market, the percentage of the relevant market, and concentration

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within the relevant market of the companies involved in this acquisition, how would you have gone about doing it?

MR. JINKINSON: Your Honor, I object to this question as asking for a hypothetical answer -- it is not even a hypothetical question.

THE COURT: I will take it.

MR. JINKINSON: I object to this line of testimony.

THE COURT: I will permit it.

Objection overruled.

A Well, my own preference would have been to make a survey, a direct survey of dental dealers, within the New Yo.. Metropolitan area, and find out what their sales were to dentists and to dental laboratories.

Would you like me to elaborate on that?

Q Yes. Would you state why?

MR.JINKINSON: Your Honor, I object to that answer because it is not assuming all of the facts, one of the facts being that the plaintiff admitted that any sale by anybody to any dentist is in competition in the New York Metropolitan area.

When he is talking about dental dealers, he is not talking about all the factors in the market.

THE COURT: Overruled.

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A I would like to consider the alternatives.

Now, in relation to that I have to point out that my first response was based on my own definition of the relevant market, and I did not accept the government's definition of the relevant market.

The government's definition of the relevant market included mail order houses, and I, after examining the testimony of dental dealers who appeared here, it was my belief that the relevant market should be limited to dental dealers because they provide certain services to dentists and to dental laboratories that are not also supplied by mail order houses, nor are they supplied by manufacturers who make direct sales to institutions and other large buyers.

Now, I assume that when you are asking me about alternative methods of collecting data, you are asking me also to accept the government's definition of the relevant market and what technique would I use then.

Well, under those conditions I would have also used a survey technique. I would have inquired from dental dealers and mail order houses what their sales were to dentists and dental laboratories located in the New York Metropolitan area.

That would have been my preference.

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The alternative to that would have been to use the methods such as the Census of Manufactures Data or, alternatively, the Census of Business.

I would like to consider in some detail the objections to the use of these techniques.

The Census of Manufactures Data are not constructed for the purpose of measuring the size of this particular market. They are not constructed for that purpose at all.

So that in order to try to estimate the size of this market, namely, the sales of dental products, to dentists and dental laboratories, you would have to go through a very extensive chain of inferences, making assumptions all along the line which are highly unreliable.

For example, there is the problem of the industry definition. This is a basic problem. Usually the census classifications are not the same, do not correspond to the limits of the market that you happen to be interested in.

In this case, for example, one of the industries that has been referred to in the testimony happens to be x-ray equipment.

The way the census defines that industry, it includes a great variety of items. It doesn't only include x-ray equipment for that matter. It includes, and I have

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a list here, it includes besides what are ordinarily thought of as x-ray equipment, it includes cardiographs, electrocardiographs, electroencephalographs, electromedical equipment, electromyelographs, phonocardiographs, radium equipment, therapeutic x-ray equipment, and so on.

So that the census, for its own reasons, has constructed an industry classification that does not correspond even to what we would consider to be x-ray equipment that is used by dentists.

This is a very persistent problem in the use of census data in relation to any market, and therefore I haven't used Census of Manufactures Data used to measure markets at some other level, I mean, like the retail level.

You use Census of Manufactures Data to measure the market if you are interested in the manufactures market but you don't use it to measure the market at the whoesaler or retail level.

That is one basic objection.

The second objection is that the estimates that you have to make in order to try to have the census category conform to the particular market that you are interested in deteriorates as the part of that total market that is accounted for by your particular segment becomes smaller.

So that in this case if the dental products, the

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part that might be considered as equipment used by dentists is a very small part of the total, then the estimates or the assumptions that you have to make become increasingly unrealistic.

Q Dr. Schwartzman --

A I just wanted to -- excuse me -- make a few more points about the general validity of the Census of Manufactures Data.

Another objection is that the types of products have to be comparable at different levels.

Again, the x-ray equipment that is used by dentists is not like the x-ray equipment thatis used for other purposes. For example, one type of x-ray equipment is industrial x-ray equipment, that is included along with other types of x-ray equipment, so that they are not really - we are not talking about the same thing. We are adding upapples --

THE COURT: You mean they have x-rays to detect hijacking at airports?

THE WITNESS: Yes. That, too.

And in industrial products x-ray equipment is used for some purposes.

Then the next point has to do with the problem of intra-industry shipments. This is a very serious problem.

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The measure that the census makes available is called Value of Shipments.

This includes shipments between manufacturers. It also includes-- and I might say this, having regard to what the previous witness just said-- the Value of Shipments includes inter-establishment shipments that are within the same firm.

You see, the Census of Business uses the sales figure, they don't use the concept of shipments. But the Census of Manufactures uses the shipments concept.

So these are shipments between establishments.

Finally, again, you run into the problem that you don't know where these shipments are going to. They are going abroad perhaps, or you have absolutely no idea of where they are going, and you don't know what share goes into the Metropolitan area, which is the geographic limit of the relevant market.

THE COURT: Doctor, what is this expression you use, Census of Manufactures? Is that your way of referring to the Bureau of Census figures?

THE WITNESS: Well, there are different censuses that they conduct. The previous witness was discussing the Census of Business, which includes the Census of Retail Trade, the Census of Merchant Wholesalers and so on.

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That is under the Census of Business.

THE COURT: Yes.

THE WITNESS: But the Census of Manufactures is another census which the Bureau conducts, and that is a manufacturing establishment.

THE COURT: But we don't have any exhibits based on the Census of Manufactures, do we?

MR. SIRIGNANO: Your Honor, we do and I believe I can clarify this with my next question.

THE COURT: All right.

Q Doctor, I would like you to look at Defendant's Exhibit O.

A Yes, I have it.

Q Defendant's Exhibit O is an exhibit which sets forth Dr. Gould's estimate of both United States sales and sales in Metropolitan New York.

Have you had an opportunity to study this?

A I have.

Q Do you have any opinion as to the validity of Dr. Gould's method?

A Yes. I believe that the method is very inappropriate for the measurement of the size of the relevant market in this case. And I will explain the nature of my objections.

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I am going through --

MR. JINKINSON: Your Honor, I have a standing objection to this testimony.

THE COURT: Yes, you have an objection to this whole line of testimony.

I will take it.

A Now, I have already explained the problems that one has in dealing with the type of data that Dr. Gould used, which was the Census of Manufactures Data that I referred to previously.

He used the measure of shipments by manufacturing establishments of products which purportedly were used by dentists and dental laboratories.

Basically his estimate consists -- is based on a sum of the shipments of several product lines, the first one of which constitutes a very large share of the total, namely, x-ray apparatus and tubes, for which he obtained an aggregate value of total shipments of 179.8 million dollars.

I have already stated my general objection to using this as a measure of the sales of x-ray equipment to dentists and dental laboratories.

But I also want to point out that even ~~accepting~~ Ex this general objection, there are serious detailed objections

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that can be made to Dr. Gould's specific estimate.

He used the figure of 179.8 million dollars. But he disregarded the information that is provided on the table that he used for that purpose, which showed sub-sectors, the sales of sub-sectors of that general group, which were obviously completely unrelated to dental x-ray equipment.

I list here diathermy equipment, .9 million; electrocardiographs, 11 million; other electronic equipment, the general heading is Medical Diagnostic or Therapeutic Electronic Equipment, except x-ray. That is the general heading. And under that you have "Other"; which amounts to 42 million.

Now, under x-ray equipment he included industrial and scientific x-ray equipment, which is obviously outside the particular area in which we are interested.

If I exclude those, if I exclude the appropriate ones, I would get, instead of his figure of 179.8 million, it would come down to -- it should be 93.6 million.

Now, when you work out all of the other adjustments that he makes, this represents a reduction, a significant reduction in the size of the market.

There were other items here that were equally objectionable. He included, for example, anesthesia

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apparatus and oxygen tents.

There is some anesthesia apparatus, I suppose, that is used by dentists, but very little compared to the anesthesia apparatus and oxygen tent that is used everywhere else.

So that the estimate does seem to be exaggerated, even in terms of Mr. Gould's own framework.

Then in order to arrive at an estimate, he had to make some sort of assumption about the distribution of the sales at the manufacturer level between dentists and others, and he used as his basis 25%, because of the total number of medical people including dentists, dentists constituted 25%.

I don't see any basis for that. This is a very arbitrary assumption, and it surely was possible to do better.

I can't suggest offhand how to do better, but this was a highly arbitrary judgment.

It is also perhaps the reason that I wouldn't use this method at all. But in any case, it does seem to be highly arbitrary.

He went on from there to estimate the share of total sales that went to the New York Metropolitan area. This was based on the share of wholesale sales of dental

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products made by wholesale dealers located in the New York Metropolitan area, and that was 17.4%.

The assumption there is that these wholesalers sell as much outside the New York Metropolitan area as -- well, let me phrase it differently.

The assumption is that the sales of wholesalers in New York, as a ratio of the sales of wholesalers in the United States as a whole, is the same as the ratio of purchases by dentists in New York to the total purchases by dentists in the country as a whole.

This may or may not be the case, but I want to point out that New York City is a major distribution point for the country as a whole, in general, and this probably applies to dental products as much as to anything else.

So that one would expect that the sales of whoesalers located in New York City would contain a larger proportion of sales outside the area than would be typical in the rest of the country.

So I think that that assumption is highly questonable.

And, finally, as part of that we have to point out that this figure would include exports, and New York is a major exporting point.

That would be my objection to Mr. Gould's procedure.

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Q Are you familiar with Mr. Ellis' estimate of purchases in the Metropolitan New York market by dentists and dental laboratories amounting to $60 million in 1968?

A Yes, I am.

Q Do you have any opinion as to the validity of the system he used to arrive at that figure?

A Well, I would like to discuss that. I have some doubts.

MR. JINKINSON: Objection. Commenting upon the testimony of Mr. Ellis.

THE COURT: I will take it.

MR. JINKINSON: May I have a standing objection?

THE COURT: Yes.

A I read the testimony, and I did not see a detailed description of the nature of the survey.

I might say that one basic ~~assumption~~ OBJECTION I would have to this type of survey being used is that the survey itself, the survey of dentists, was not undertaken with the view to measuring the market for dental products specifically; it was undertaken for some other reason.

I assume that the reason that this survey is made ~~as to~~ inform dentists concerning their costs of operations, their income, and other data in which they may be interested, as compared with other dentists, either in the country as

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a whole or within the area in which they live, which comes out in a variety of ways.

But the survey was not undertaken for the purpose of measuring the market for dental products. Therefore, presumably the care which was exercised in constructing the questions was not such as you might undertake if you were interested primarily in measuring the market for dental products, especially in a particular area.

So that I would question whether the wording of the questionnaire that was distributed was carefully done with that in mind.

I don't know what the questions were.

I would also question the basis for the estimates. Were the respondents, the dentists, asked to use records or were they asked to make estimates casually?

My suspicion is that they might be accurate with respect to their total expenditures because they need these data for income tax purposes but they might not be accurate for component parts like dental products.

The other question would have to do with the representativeness of the sample of dentists.

Usually in surveys of this type there is a problem of how representative are the respondents, those who

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actually respond, because there is no legal liability on them not to respond, so you have to depend on the respondents being representative of the rest of the population..

You are never sure of that.

Sometimes an effort is made in surveys of this type to go after those who don't respond in order to try to get the sample to be as representative as possible.

Now, I don't know what efforts were made to make the sample representative, or whether there is any -- sometimes certain characteristics of the respondents are checked against the characteristics of the general population that is being surveyed to find out whether there is anything that differentiates the respondents and therefore makes them unrepresentative of the general population.

Now, I don't know whether any of that was done. Nor do I know whether the-- well, that about covers those points.

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Again, there was the problem with the regional breakdown here and I think that the regional breakdown was based on the same 17 per cent which I commented on before.

That's about all I would have to say.

Therefore, I don't think I would trust this particular type of estimate very much.

THE COURT: And your last answers have been directed, Doctor, to what particular survey?

THE WITNESS: This was the survey of dentists that Mr. Ellis based his estimate of the size of the market.

THE COURT: By the American Dental Association?

THE WITNESS: That's right.

THE COURT: All right.

MR. SIRIGNANO: Your witness.

THE COURT: All right, Mr. Jinkinson.

MR. JINKINSON: Can we have a little recess or else recess for lunch?

THE COURT: All right. Do you want to recess for lunch and come back at 2 o'clock?

MR. JINKINSON: Yes.

MR. SIRIGNANO: Your Honor, I was just going to suggest since this was our last witness it may be in a very short time we can complete the case.

MR. JINKINSON: I rather take our lunch break,

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gth 2

your Honor. I am not asking for two days like the government.

THE COURT: All right, let us go to lunch and come back at 2 o'clock.

(Luncheon recess)

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AFTERNOON SESSION

BY MR. JINKINSON:

Q Dr. Schwartzman, how many dental dealers in this area have you interviewed?

A None.

Q None before the first time you testified and none before your testimony here?

A I have never interviewed a dental dealer.

Q How many surveys have you compiled or made that have been accepted by the courts?

A None. I have never compiled or made a survey.

Q In making a survey, in the New York Metropolitan area, how would you assure yourself you are surveying every dental dealer in the area?

A Well, I would consult whatever directories there are. There are probably trade association directories of dealers. I would use the business directory. I would find out from dealers that I do come across in one way or another who other dental dealers are.

I would try to compile a list in the first place.

Now, it is true that I might miss some, but I wouldn't let them worry me too much because those that I would miss presumably would be small ones, and I am mainly

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interested in the aggregate sales estimate. So that the estimate of the aggregate sales would not be wrong significantly, because of a few small dealers I might miss.

Q Would you require a complete rostery, as Mr. Wikoff testified this morning --

A Well, I would try --

Q -- in which he said the Census Bureau obtains, such as IRS figures and the employer compensation figures and these things, which Mr. Wikoff testified he wanted all those things before he would be assured that he would have the complete survey- would you require those things?

A Well, I couldn't require them, but I would try to get as complete a list as I possibly could.

Q Would you want them in making a complete survey?

A Well, I would like to have them if I could get them. I don't know that I could get them. But if I could get them, I would like to have them.

Q Can you tell the Court what the total sales of dental products in 1968 were by the dental dealers surveyed?

A I didn't get --

MR. SIRIGNANO: Objection. The survey evidence is in the record. We have exhibits.

THE COURT: You mean you are asking him what that

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exhibit shows?

MR. JINKINSON: I am asking him if he knows what it shows.

THE COURT: I will permit it.

A I recall that it was around 30, 31 million dollars.

Q Are you familiar with the input-output tables published by the Department of Commerce?

A I have seen input and output tables.

Q Are you familiar with them? That is the question.

A I can't say that I have looked at them recently.

Q Are you aware that sales by manufacturers are traced to the ultimate consumer in various markets through those tables?

A Yes.

Q Are you?

A Yes.

Q Aren't you aware that using this input-output sale data the United States Government had determined market estimates in hundreds of markets from the viewpoint of sellers and purchasers?

A Well, I am aware of that, but can I elaborate a little bit on that?

Now, the purpose that that is used for, in

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general, is for determining the economic effects of important economic developments in the economy as a whole.

Now, for example, you might want to estimate what the effect would be of requiring certain regulations governing pollution to be fulfilled. The industries that have to undertake the costs of pollution controls will have to raise their prices, and this presumably will be passed on to other industries through the increases in prices of the products, and there will be a chain reaction.

Now, the advantage of the input-output method, the main advantage of the method, is that it permits you to trace through the economy what the ultimate effects are of certain economic changes that you identify in advance.

Now, there is no particular --

MR.JINKINSON: Your Honor, all this is not responsive to the question.

THE COURT: What is the question?

MR. JINKINSON: I only asked him whether or not he was aware that in using this input-output information or data that the United States Government uses, that it determines that market estimates in hundreds of markets are made of both sellers and purchasers.

That is the only question. All I want to know is

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if he is aware of that.

A I have answered that question by saying that I am aware of it but I also say-

Q Fine.

THE COURT: Doctor, do you think that this explanation is necessary for me to understand your answer?

THE WITNESS: Yes, I think so.

THE COURT: All right, then I am going to permit it.

Go ahead.

A Now, the main purpose of this is to determine such things as employment effects of important economic changes, where these employment effects might be located, what resource requirements will be -- what -- what resource requirements will be, et cetera, a variety of economic changes.

Now, it is not used, to my knowledge, for the type of question at issue here. In other words, what is the relevant market in this particular case? That technique is not used. Because all it means is that you are using Census of Manufactures Data to measure the sales to dentists and dental dealers, and that seems to be ridiculous on the face of it.

Q Are you aware, Dr. Schwartzman, that the number

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of dentists that Mr. Ellis used in making his analysis was based upon the ADA, the American Dental Association records of dentists actually practicing in the New York area and was not based upon an allocation of a national figure?

Were you aware of that in criticizing his survey?

Just answer that question.

A I am aware that it was based on a survey of dentists.

Q Made by the American Dental Association?

A Made by the American Dental Association.

Q And wasn't it also an allocation of dentists on a national figure?

A No. I was aware of that.

Q Do you have any reason to believe that Mr. Ellis' estimate for the New York area market is too high or too low?

A No, I have no reason to believe that it is either too high or too low.

Q You studied Mr. Ellis' testimony and his survey. Didn't he omit certain buyers from the market, i.e., federal dentists, federal institutions, both local and national, and state?

A I will take your word for it. I don't recall now

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whether he did or not, but I am willing to accept your word for it now.

Q Getting back to Dr. Gould's survey, he stated that he omitted, for want of his ability to accurately define them, certain products, such as paper cups, cabinets, trays, and other sundries, for which he did not have time to make a complete survey; isn't that right?

Did you find that correct?

A Yes,that's right.

Q Do you admit that they should have been included in the survey?

THE COURT: No, the witness is here to testify. He is not admitting or denying.

I think I can't have a question in that form. He is not here to argue, to dispute, to contend. He is here to testify.

MR. JINKINSON: I have no further questions.

MR. SIRIGNANO: Nothing further.

THE COURT: Thank you, Doctor. You may be excused.

(Witness excused.)

MR. SIRIGNANO: Your Honor, we requested the defendant to provide certain sales figures, which they stated they would have available today, and I understand

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hph1 Gould-redirect

T2 JAY M. GOULD, having been previously sworn, was recalled and testified as follows:

REDIRECT EXAMINATION

BY MR. JINKINSON:

Q Dr. Gould, you have testified previously in this case, haven't you?

A Yes, I have.

Q You were here this morning in court?

A Yes, I was.

Q Did you hear the testimony that there may be a factor of double accounting which inflates the wholesale figures shown in Exhibit A?

A Yes.

Q Do you have a way of measuring the degrees of duplication?

A Yes.

Q What is it?

A In comparing the figures reported in the wholesale trade, on a national level for 1967, a figure of $315,000,000 there is a way of determining how good that figure is with respect to all the limitations that the census of wholesale trade is subject to, limitations which include on the one hand errors of non-reporting, for which some duplication procedure is necessary, and on the other, degrees of

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duplications which are also inherent in any figures which represent a middleman function because the definition of a middleman could include a whole series of middlemen trading with each other.

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That validation comes from comparing that figure with independently derived estimates of the market, as seen from both the seller's standpoint, that is, the manufacturing seller, or the purchasing standpoint, the dentists and dental labs. I tried to show that both of these independent estimates gave, for the year 1967, a figure somewhere between $450,000,000 and $481,000,000, and when this is compared, these figures are compared to the $315,000,000, and I thought I heard Mr. Wikoff agree that such a difference could be attributed to the absence in the census figures of certain categories he enumerated, such as manufacturer's sales agents, representatives and direct sales, but I also understood him to say that for that reason there are certain difficulties in using the census of wholesale trade and that's why I felt it necessary and desirable to contrast that figure with these independent estimates. But, there is even a further extremely important point involved here, and I think it hasn't been brought up yet, and I would like the opportunity, because it is related to the problem of so-called duplication. And, that is this: the census estimate for

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1967 offered as a minimum figure, and possibly subject to duplication, $50,000,000 in the New York area in 1967. I had an opportunity to examine the plaintiff's statistical material for the 61 firms that they surveyed in 1968, and I know that on line 2 of that inquiry there was a question on their total sales, the same figure that would be subject to the same degree of duplication that the census inquiry would be subject to, and I had an opportunity to observe very quickly that if one added that figure for all 60-odd firms that they covered, the total derived would be far, far below the $55,000,000 figure. This, I think is the chief reason for my feeling that it was necessary to bring the other figures into play to isolate the fact that the government survey was hopelessly under-estimated because if that figure was subject to the same degree of duplication as the census figure, it should certainly come in the neighborhood of $55,000,000 and it does not. My own impression is, it is somewhere in the thirties.

Q Do you have an opinion of whether or not the $315,000,000 figure on Plaintiff's Exhibit 20 reflects excessive duplication?

A I would say no, because the figure is obviously far below the two estimates independently derived of what the size of that market should be. The $315,000,000 is so

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far below $450,000,000 that I would say the degree of duplication inherent in that figure is certainly not excessive.

Q Dr. Gould, you heard Dr. Schwartzman comment on the procedures you used in making your survey. Do you agree with his comments?

A No, I certainly do not.

Q Why do you not agree with it?

A Well, Dr. Schwartzman went to great pains to point out that in some of the categories I included types of X-ray equipment which would not possibly flow to the dental market, and I don't take exception to that because I think I indicated in presenting these figures that I was only concerned with establishing in a common sense way, the gross magnitudes involved, and I even recall having made an arithmetical mistake in calculating that particular figure which indicates I certainly did not offer it as a product of many weeks of pin-point precision. In fact, I want to say there were many items which clearly belong in these markets, such as the paper towels and cups and sundry items which if I had time, I know, since this is my avocation, this is what I do professionally, if I had had sufficient time, I certainly could have offered estimates for these missing items. I did not feel it was necessary because I was only concerned to establish that Mr. Ellis' national figure, which had been offered to

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the government in response to their specific request, that his figure of $481,000,000 was sufficiently in line with even my crude exhibit, that I didn't feel it was necessary to take the time to prepare any more elaborate figures. But, I must say, in defense of the input, output procedure which is involved here, that Dr. Schwartzman is totally in error when he asserts that he does not know what the use of the input and output estimates, in antitrust litigation. I myself have had an opportunity of using it in the last six cases, antitrust cases in which I have testified, precisely because there is no other way of establishing the market for a product because it brings into play the discipline of having two alternative ways of looking at a market. One does not dismiss this method by saying it is difficult to apply and, therefore, should not be used. On the contrary, the difficulty should be a challenge to a statistician, even to meet the difficulties in order to provide the best possible estimate for the market.

MR. JINKINSON: Thank you. You may examine.

MR. SIRIGNANO: No questions.

THE COURT: Thank you very much, Dr. Gould.

(Witness excused)

MR. JINKINSON: Your Honor, I would like to call --

THE COURT: You have the housekeeping matter ?

* * *

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UNITED STATES OF AMERICA,
Plaintiff,
-v-
HEALTHCO, INC. (formerly known as
HEALTHCARE CORPORATION),
Defendant.

70 Civ. 1312

Plaintiff moved on papers during the trial to strike the following ten exhibits of defendant Healthco: B, C, D, J, K, R, U, V, W and X. Exhibits R, U, V, W and X were referred to in the transcript as plaintiffs exhibits 53, 51, 52, 54, and 55 for identification until offered by the defendant (SM 878-79, 884). Plaintiff also seeks in its motion papers to strike the testimony of defendant's statistician, David Ellis, relating to the ten exhibits.

The motion is based upon the contention that the proffered exhibits and the related testimony are based on survey hearsay evidence for which no proper foundation has been established.

The following is a brief description of each of the exhibits.

Exhibit R is entited "Health Manpower Sourcebook", compiled by the United States Department of Health, Education and Welfare, for the year 1968. Table 66 on page 81 contains an analysis by states of the number of active dentists. The objection to this exhibit was withdrawn by plaintiff (SM 878).

Exhibit U is entitled "The 1968 Survey of Dental Practice" and is published by the American Dental Association. The survey was conducted in 1968 and was designed to measure the average income and expenses of dentists in the various localities in which they practice. The questionnaire used in the survey is set forth on pages 4-7 of Exhibit U. Expenses of dentists (those not employed for a salary) are set forth on pages 16-18 of the same exhibit.

Exhibit V is entitled "Distribution of Dentists in the United States" and was published by the American Dental Association in 1969; it covers dentists practicing in 1968. It contains an analysis by states and counties of the number of dentists. The statistics relevant to the Metropolitan New York area are contained on pages 37 and 39 of this exhibit.

Exhibit W is entitled "The 1971 Survey of Dental Practice" and was published by the American Dental Association.

It is a more recent edition of the report offered as Exhibit U. Methodology of the survey used in compiling the report is summarized on pages 3-8 of Exhibit W.

Exhibit X is entitled "Operations Analysis of the United States Dental Laboratory Industry, 1968" and was published by the National Association of Certified Dental Laboratories. It is an analysis of the income and expenses of dental laboratories based on a survey conducted by the Association.

The other exhibits now in question were based on Exhibits R, U, V, W, and X.

Exhibit B is a chart designed to compare the purchases of dental products by Metropolitan New York area "ultimate consumers" (here dentists and dental laboratories), as taken by Mr. Ellis from the data of Exhibits R, U, V, and W, with the sales figures taken from the plaintiff's survey and charts (Exhibits 31-43). Exhibit B also uses as a basis for comparison the figures of sales of dental products taken from Census Bureau data, previously in evidence as plaintiff's Exhibit 20 and defendant's Exhibit A. (Exhibit 20 shows that, for the year 1967, 655 dental establishments sold $314,000,000 in dental supplies nationwide (SM 460); Exhibit A shows that there were 118 dental establishments in the Metropolitan New York area selling $55,000,000 in products (SM 462).

Exhibit C is a chart used to contrast Mr. Ellis' estimation of purchases by ultimate consumers (here dental laboratories and dentists) in the Metropolitan New York area with the government tabulation of sales by dealers in the market (Exhibits 31-43). Exhibit C covers the years 1968, 1969 and 1970. It is designed to show that the plaintifff's survey has understated the relevant market for dental products (SM 417).

Exhibit D is a chart which compares the purchases of dental products as reflected in Exhibit B with the sales by Healthco for the years 1968-72. The purchase market, as projected by Mr. Ellis, increases at a faster growth rate than the actual sales by Healthco during this period (SM 484-485).

Exhibit J compares dental purchases by dentists and laboratories with sales by dealers from 1961-72. The purchase data were based on the American Dental Association survey for 1961, 1964, 1967 (Exhibit U) and 1970 (Exhibit X). Dealers' sales were based on the analysis of the American Dental Trade Association for the years in question (SM 473, 475). Mr. Ellis has served as Director of Statistics for the latter trade association since 1957 (SM 391).

Exhibit K is a graph which reflects an accurate summary of Exhibit J, comparing the growth rate of purchases of dental products with the growth rate of dealers' sales. It is entirely dependent for its admissibility on Exhibit J (SM 574).

Healthco offered the foundation for Exhibits U - X in the following manner. It gave access to the plaintiff to the existing underlying data (survey responses) for these exhibits (SM 869). Plaintiff conceded that there was sufficient time to examine the data (SM 880). With respect to Exhibit X, it was reported that the underlying data was destroyed in the regular course of business (See Exhibit S, an affidavit of the Director of the National Association of Certified Dental Laboratories). It is conceded by Healthco that Mr. Ellis has played no role in the collection of the data which supports these exhibits (SM 602). It is also clear that defendant has not called any person who compiled the data making up the proffered exhibits (U, V, W and X).

Healthco seeks to justify the admission of these exhibits on two theories. First, it is contended that a proper foundation exists for the admissibility of Exhibits U, V, W, and X and, therefore, that the charts and testimony based on these exhibits are likewise admissible. The second theory is based upon Mr. Ellis' qualifications as an expert statistician with experience in the analysis of the dental products industry. It is argued in this regard that Mr. Ellis is qualified to express an expert opinion on the size of the dental product market and the trends in the dental products industry regardless of the evidentiary validity of the underlying data.

The theories of the admissibility of these exhibits and testimony present the issue of what foundation must be established by the proponent before survey evidence of a hearsay nature can be considered admissible.

In the present motion it is clear that if a proper foundation exists for the admission of the surveys reported in the booklets, Exhibits U, V, W and X, then the charts constructed by Mr. Ellis, along with his statistical analysis, can be properly admitted.

The admission of survey evidence is dependent on the necessity of the data represented by the survey and on the circumstantial trustworthiness of the data. See 5 Wigmore, Evidence §§ 1420-1422 (3d ed. 1940). The latter requisite is most often met by a showing that the underlying data of the survey was offered to the opposing side with time for study, and that the persons who designed and supervised the survey were available for cross examination in order to expose weaknesses in the methodology of the survey. See 1 Pt. 2 Moore's Federal

Practice, Pt. 1 ¶ 2.712 (2d ed. 1973), E. G. Barksdale, "The Use of Survey Research Findings as Legal Evidence" (1957), pp. 120-121

Mr. Ellis contended that only an analysis of the dental market from the point of view of purchases by ultimate consumers within the Metropolitan New York area could accurately portray the size of the dental product market at issue (SM 410). He believed that this analysis would show that the plaintiff's survey of dental dealers significantly understated the market for the products (SM 424). Therefore, to support this contention it was necessary to measure the dental market from the point of view of the purchasers. The survey publications concerning the income and expenses of dentists and dental laboratories provided the only ready basis for the Ellis analysis. The use of these publications involved a significant saving of time and effort for the defendant and the Court.

However, the second requisite of survey evidence, the circumstantial trustworthiness of the survey data, is on less solid ground. While the underlying data for Exhibits U, V, and W were presented to the plaintiff (SM 869) and while it was conceded by plaintiff that there was adequate time to study the responses (SM 880), there was lacking the testimony of any person who took a direct part in the supervision of the surveys. Such testimony is important to assess the methodology of the survey, a factor vital to its trustworthiness. Zippo Manufacturing Company v. Rogers Imports, Inc. 216 F.Supp. 670.684 (S.D.N.Y. 1963); Barksdale, above, page 121.

The failure of the defendant to call persons involved in the surveys was a significant omission but it need not be fatal. The threshold requirement of trustworthiness may derive from sources other than the testimony of such persons.

Wigmore, in his treatise on Evidence, 5 Wigmore, above, §§ 1702, 1704, 1706, discusses the admission into evidence of reports, lists and registers used in business and trade without the need for testimony of the individuals who prepared these reports. He states that a circumstantial probability of trustworthiness may be found in the fact that such reports are prepared on a regular basis for use in commercial businesses. 5 Wigmore, above, § 1702. The accuracy of such reports is assured because the maker knows that its acceptance in the profession and, therefore it's value, are dependent on its correctness.

While the business reports exception to the hearsay rule referred to by Wigmore does not specifically include surveys, and reports of surveys, it would seem to be capable of expansion

to cover such reports, if they have been prepared by disinterested persons for business rather than for litigation purposes. See 5 Wigmore, above § 1708; Dession "Trial of Economic and Technological Issue of Fact, II, 58 Yale L.J. 1242, 1269-70

The surveys and reports in question (Exhibits U, V, W , X) were prepared on a regular basis by statisticians of the American Dental Association and of the National Association of Certified Dental Laboratories, prior to and unrelated to this, or any other lawsuit. They were designed to be used by members of the dental industry for various economic and business decisions; a motive for accuracy was thus present. In fact, Exhibit R (Health Manpower Source Book published by HEW) states that much of the data used in analysis of the dental profession came from statistics supplied by the American Dental Association (Exhibit R, pp. 71-86). Furthermore, there is the testimony of Mr. Ellis stating that he frequently relies on the data of the American Dental Association surveys and reports in his work for the American Dental Trade Association (SM 402, 410-12).

It is concluded that a sufficient foundation has been established by the plaintiff's examination of the underlying survey data, the fact the surveys were regularly prepared for use in the dental trade, rather than for litigation, and the testimony that these reports are relief on by individuals of this particular industry. While personal testimony on the construction of the survey is lacking, it is believed that this factor can be properly assessed in analysing the credibility of the opinion of Mr. Ellis as to the size of the relevant line of commerce.

A special word should be said with respect to Exhibit X, the survey of dental labs. The underlying data were destroyed in the regular course of business, no testimony of anyone personally connected with the survey was introduced, and the report itself states that of 120 responses returned by dental laboratory owners only 75 were in usable condition. While Exhibit X will be admitted in evidence with great reservation, its credibility may be suspect.

The admissibility of Mr. Ellis' testimony finds added support in his role as an expert witness.

It is undisputed that David Ellis qualifies as an expert statistician through his 20 years of work in government and private industry (SM 391-392). As Director of Statistics of the American Dental Trade Association he is involved in the preparation of reports concerning the statistical aspects of the dental product industry. He is qualified to express his

opinion as to the size of the Metropolitan New York market for dental products.

Mr. Ellis, as an expert witness in this area, may use the identifiable reports of third persons to support his opinion. See McCormick Evidence § 15, at p. 36(2d ed. 1972); 5 Wigmore, above, 665B; Moore's, Proposed Rules of Evidence, above, § 703.

In summary while it is clearly preferable that persons with knowledge of the survey should be available for cross examination, the exhibits and testimony resting on the surveys will be admitted into evidence.

The Court expresses no opinion with respect to the weight of the exhibit evidence. It may be noted that the failure of defendant to call persons directly connected with the writing of these reports (Exhibits U-X) may be a factor in assessing the value of the opinion of Mr. Ellis as to the extent of the line of commerce in the Metropolitan New York market.

The motion of plaintiff to strike is denied.

SO ORDERED.

Dated: December 18, 1973

Inzer B Wyatt

INZER B. WYATT
United States District Judge

UNITED STATES OF AMERICA,
Plaintiff,
-v-
HEALTHCO, INC. (formerly known as
HEALTHCARE CORPORATION),
Defendant.

70 Civ. 1312

During the trial of this action, plaintiff offered in evidence exhibits 26, 28, and 30 through 45. These were received over objection by defendant and a motion to strike was deemed made, on which motion decision was reserved (Tr. 302; SM references are to pages of the stenographic minutes).

Memoranda have been submitted by the parties and have been considered. It appears that defendant is not moving as to Exhibits 26, 28 and 30. The motion is addressed to Exhibits 31, 31(a) and 32 through 45. This is the decision of that motion.

The action was commenced on April 2, 1970. At that time defendant was named "Healthcare Corporation". About August 1971, the name was changed to Healthco, Inc.; defendant will generally be called "Healthco".

The complaint avers that Healthco, while engaged in the sale of dental products in the Metropolitan New York area, made certain corporate acquisitions in violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

The complaint avers (para 6) that dental products consist of dental equipment, dental sundries, artificial teeth and precious metals used in dental work.

Metropolitan New York is defined by the complaint as amended in the pretrial order to include the City of New York, the Counties of Westchester, Rockland, Nassau and Suffolk in the State of New York, and the Counties of Bergen, Essex, Hudson, Passaic, Union, Morris, Somerset and Middlesex in the State of New Jersey.

Dental products are sold by Healthco and its competitors to dentists, dental laboratories, dental schools, hospitals and government agencies (collectively referred to as "ultimate consumers").

Specifically, the complaint avers (paras 12-17) that the following acquisitions within the Metropolitan New York Area may have lessened competition in the dental product market:

Healthco's acquisition of substantially all the assets of General Dental Supply Co. Inc. on May 9, 1969.

Healthco's acquisition of substantially all the assets of H. A. Soehner Dental Equipment and Supply Co. Inc. on June 20, 1969;

Healthco's acquisition of substantially all of the assets of Hebard-Metro Dental Company, Inc. on November 15, 1969; and

Healthco's acquisition of substantially all of the assets of Hebard Dental Supply Company, Inc. on November 15, 1969.

Shortly after the filing of the complaint, plaintiff requested Dr. Ritchin, a government economist, to conduct a survey of the sellers of dental products within the Metropolitan New York area. (SM 272)

The main purpose of the government survey was to measure the market of sellers of dental products within the Metropolitan New York area. The sales by these sellers to ultimate consumers in the Metropolitan New York area were alleged to be the line of commerce affected by Healthco's acquisitions.

Exhibit 26 is a survey form sent to dental dealers to elicit the following information:

a percentage breakdown of each dealer's total sales into dental equipment, dental sundries, artificial teeth, precious metals and services relating to dental equipment (Question One);

total sales of each product and service for the years 1968, 1969, and 1970 (Question Two);

the breakdown of total sales to each group of ultimate consumers for years 1968, 1969, 1970 (Question Three);

total company sales as classified by counties of the Metropolitan New York area for the years 1968, 1969, and 1970 (Question Four); and

total company sales to geographic areas outside of the Metropolitan New York area for the years 1968, 1969, and 1970 (Question Five).

Exhibit 28 is a questionnaire survey form sent to mail order houses in order to measure their sales of dental

products to ultimate consumers within the Metropolitan New York area (SM 286). It differs significantly from Exhibit 26 in that no product or geographic breakdown is sought (SM 287).

Exhibit 30 is a copy of a survey form used by plaintiff to elicit a percentage breakdown of sales in the Metropolitan New York area (years 1968, 1969, 1970) by manufacturers to dental dealers and wholesalers, and direct sales by such manufacturers to ultimate consumers (specifically Question Three in the survey).

As part of Exhibit 30, the dollar volume for the years 1968, 1969, and 1970 of sales to each group of ultimate consumers was sought in order to estimate the share of the dental product market represented by such direct sales (Question Four, SM 288).

Exhibit 31 is a compilation of the original responses to the government survey form mailed to dental dealers and mail order houses believed to comprise the dental product market within the Metropolitan New York area (SM 292). This Exhibit 31 rests upon the two survey forms introduced in evidence as Exhibits 26 and 28.

Exhibit 31(a) is a survey response offered as part of Exhibit 31.

Exhibits 32 through 43 are tabulations and charts based on the responses compiled in Exhibit 31 and, of course, stand or fall depending on the admissibility of Exhibit 31.

The results of the survey as shown in Exhibit 31, along with the tabulations based upon it, are offered to show the dimensions of the relevant line of commerce and that the acquisitions by Healthco may substantially lessen competition within the dental products industry of the Metropolitan New York area.

Exhibit 44 is a compilation of the original responses to the survey form, Exhibit 30, mailed to manufacturers selling dental products to ultimate consumers within the Metropolitan New York area.

Exhibit 45 is a chart based on the responses compiled in Exhibit 44 and, of course, stands or falls depending on the admissibility of Exhibit 44.

The surveys reflected in Exhibits 31 and 44 were based upon the responses from 56 dental dealers, 5 mail order houses, and 23 manufacturers selling dental products in the Metropolitan New York area to ultimate consumers. They purport to measure the entire market.

The names of the companies surveyed were compiled from various trade association manuals (SM 276), answers to interrogatories supplied by plaintiff (SM 275, 84, 89, 90) and interviews with dental dealers selling within the Metropolitan New York area (SM 277).

While defendant objects to Exhibits 31, 31(a) and 32 through 45, the objection is really to the surveys, Exhibits 31 and 44.

Defendant, in support of its objections, relies on the testimony of David Ellis, a statistician of the American Dental Trade Association. Mr. Ellis gave testimony challenging the validity of the survey with a particular emphasis that the line of commerce could not be fully defined by surveying only the companies questioned.

Defendant makes the following objections to Exhibits 31 and 44:

(a) the surveys (and the charts based on them) do not support the plaintiff's contentions;

(b) the surveys do not prove anything because the sellers surveyed did not cover the entire dental product market;

(c) the validity of the surveys was destroyed by testimony of Dr. Walter Schwartzman, an economist testifying for plaintiff; and

(d) the surveys were inadmissible hearsay.

The first three objections turn upon a central issue in this action, namely, the definition of the line of commerce affected by the acquisitions in question. Although it would seem that these objections are relevant only to the weight to be attached to the surveys, a few comments may not be inappropriate.

Defendant's witness, David Ellis, testified that an incomplete "universe" of sellers was surveyed and that, therefore, the results grossly understated the market for dental products; this understatement resulted from the erroneous exclusion of sellers of dental products from the surveyed "universe" (SM 423, 424, see also SM 329-334).

It is argued that, without a complete survey of the "universe", the validity of the entire survey is destroyed, ("universe" or "population" may be defined as the total group of elements whose characteristics are to be studied; see A.G.

Barksdale, "The Use of Survey Research Findings as Legal Evidence" (1957), page 20).

Without passing on the merits of this argument, it is clear that such undercoverage by a survey will not render the exhibits inadmissible. The question of undercoverage of a universe was considered in United States v. National Homes Corporation, 196 F.Supp. 370, 372 (N.D. Ind. 1961). It was stated (at p. 372):

> "The postponement of the Court's decision of the coverage question, however, does not render the survey inadmissible in its entirety. In other words, if answers obtained in the survey are sufficiently trustworthy and accurate to be admissible, they should be allowed to come into evidence. Matters relating to the coverage of the survey would go to its probative value.

Consequently, while the surveys of plaintiff may not have properly covered the entire dental product market, this would not require the exclusion of the surveys so long as there is a proper foundation. Furthermore, since the companies surveyed were clearly involved in the Metropolitan New York market and the data collected were relevant to the affected line of commerce, there is no ground for saying that the surveys covered an improper or irrelevant universe and on that account should be excluded.

Similarly, the exhibits are not inadmissible because of testimony by Dr. Schwartzman that the survey overcovered the market. Dr. Schwartzman, testifying for plaintiff, stated that he would limit the universe to be studied to dental dealers, excluding mail order houses, included in the Exhibit 31 survey (SM 375, 827). This again relates to a central issue in the case, namely, whether dental dealers are in a separate line of commerce. This issue need not be considered at this stage because it is not relevant to the admissibility of the Exhibit 31 survey. In fact, any inconsistency between the coverage of the survey and Dr. Schwartzman's testimony is in the defendant's favor, since the scope of the survey was broader than that suggested by the testimony. Moreover, the rationale of United States v. National Homes, above, is as applicable to errors in overcoverage of the universe as to errors in undercoverage.

The basic legal issue in considering the admissibility of survey evidence is the hearsay nature of the responses to the survey. However, given the complex and lengthy nature of the economic evidence involved in an anti-trust action, there is a clear trend to admit properly constructed survey exhibits despite the hearsay character of such evidence. United States

v. Columbia Pictures Corporations, 25 F.R.D. 497, 499 (S.D.N.Y. 1960); Dession, "Trial of Economic and Technological Issues of Fact", 58 Yale L.J. 1019, 1042 (1949) This trend can be accepted more readily in an action tried without a jury. See 5 Moore's Federal Practice ¶ 43.02 [3] (2d ed., 1971)

However, in order to justify the admission of such survey evidence, it must be shown that the proffered exhibits meet the traditional basis for a relaxation of the hearsay rule, see 5 Wigmore, Evidence §§ 1420-1422 (3d ed. 1940) and certain requirements peculiar to survey evidence. 1 Pt. 2 Moore's Federal Practice, Pt. 2.712 (2d ed. 1973); Barksdale, above, at 120-21

The basic requirements for the admission of survey exhibits are (a) the necessity of the evidence being introduced in this form and (b) a significant guarantee of trustworthiness of data collected. 5 Wigmore, above, §§ 1421, 1422; Zippo Manufacturing Company v. Rogers Import Inc., 216 F.Supp. 670, 683 (S.D.N.Y. 1963)

Exhibits 31 and 44 involve the compilation of over 130 responses to the survey questionnaires. The use at trial of these exhibits constituted an efficient method of conveying proof of the relatively complex economic issues involved, and undoubtedly shortened the trial. If the officers of the surveyed companies were required to testify as to the financial records and other sources used for their responses to the surveys, then the trial would have been significantly longer. While it would have been possible to have all this testimony, such a method is not practical; such cumbersome proof should be avoided where the trial is without a jury and where there are significant statistical issues. 1 Pt. 2 Moore's, above, Pt. I¶ 2.712, at page 97

The second major test which must be met before admitting survey evidence is that the responses have a circumstantial guarantee of trustworthiness. 5 Wigmore, above, § 1422.

The trustworthiness of such evidence is assured if there is proper preparation of the survey. This is met by testimony of the expert statisticians who supervised the survey, prepared the questionnaires used, compiled the data, and made such data available to the opposing side. 1 Pt. 2 Moore's, above, ¶ 2.712, ¶ 2.713 (pages 98, 99); Barksdale, above, at 115. A further showing should be made that the proper universe was surveyed, that a representative sample was selected, and that there was no bias in the questions. See Zeisel, "The Uniqueness of Survey Evidence", 45 Cornell L.Q. 322 (1960)

The necessary showing was made here by the testimony of Dr. Hyman Kitchin. Dr. Kitchin, the senior economist in the Antitrust Division, was eminently qualified to conduct market surveys of this nature (SM 272). He testified that he played a major role in the construction of all the questionnaires used in the survey (SM 283, 285-286, 287). These questionnaires contained express definitions of the products involved and the geographic area covered by the survey (Exhibit 25, SM 273).

Dr. Kitchin further testified that when the responses were received, he supervised the preparation of the charts based on these responses. Dr. Kitchin stated that he was responsible for the accuracy of the data which went into Exhibits 31 through 45 (SM 292-299).

The underlying data (including the actual responses) were made available to defendant before and during trial (SM 886-887). Furthermore, unlike surveys where the responses were confidential, defendant had an opportunity to examine the officers of the companies who prepared the survey responses and could thus determine if the responses were correct. In this connection, defendant was shown only one major difference between the data in the survey response and the figures testified to by an officer of the responding company (SM 896).

The proffered surveys are also basically free from the problems of improper sampling, improper universe and bias in the conduct of the survey. ("Sample" is defined as a subdivision of the population or universe which is used as the basis for the survey: Barksdale, above, page 21)

There is no question of inadequacy of sample in these surveys because they purport to include responses from all members of the universe. Since a random sample method was not used, no claim can be made of bias in the selection of the sample to be studied. See National Home, above cited, 196 F.Supp. 370, 372. Furthermore, the larger the number of elements of the universe covered by the survey, the more likely it is that the measurement of the given universe will be accurate. Barksdale, above, page 26. In Exhibits 31 and 44, the alleged universe coincides with the survey responses collected, thus eliminating the need for any statistical projection onto the missing elements of the universe.

The universe to be surveyed was proper as all of the companies studied were active in the dental market within the Metropolitan New York area, and were part of the lines of commerce arguably affected by the defendant's acquisitions.

Finally, any bias inherent in the surveys was limited. The mere fact that the survey project was initiated

by the government after the litigation began is not of itself significant. See National Homes, above, 196 F.Supp. 370, 372 The data sought to be elicited by the surveys were of an objectively verifiable quality rather than questions which would call for subjective responses.

With respect to the data accumulated by the surveys, the defendant's witness, David Ellis, finds bias inherent in the use of estimates (SM 454). However, the use of estimates in certain parts of the survey was explained by Dr. Ritchin, who testified that estimates were encouraged in areas where it would not be feasible for an exact determination to be made (SM 309). While this factor may affect the weight to be given to such figures, its here use should not render the survey inadmissible.

Plaintiff has met its burden to show that the surveys were conducted in a manner adequate to justify their admission into evidence. The weight to be given to the surveys and their related exhibits is a separate issue to which the parties may address themselves in argument.

The motion to strike of defendant is denied.

SO ORDERED.

Dated: DEC 18 1973

INZER B. WYATT
United States District Judge

U.S. FILED COURT
JAN 14 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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the name was changed to "Healthco, Inc."; defendant will be referred to as "Healthco".

The complaint charges that Healthco, while engaged as a dental dealer in the sale of dental products in "Metropolitan New York", acquired substantially all of the assets of four other dental dealers and that this was in violation of Section 7 of the Act. That section forbids a corporation to acquire "any part of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly".

Specifically, the complaint avers (paras 20-24) that the effect of the following acquisitions by Healthco may be substantially to lessen competition or tend to create a monopoly in the dental products market:

(1) General Dental Supply Co. Inc. (General) on May 9, 1969;

(2) M. A. Sechter Dental Equipment and Supply Co. Inc. (Sechter) on June 20, 1969;

(3) Hebard-Metro Dental Company, Inc. (Hebard-Metro) on November 15, 1969; and

(4) Hebard Dental Supply Company, Inc. (Hebard Dental) on November 15, 1969.

The government asks that each of these acquisitions be declared in violation of the Act and that Healthco be required to divest itself of each of them. It is concluded that because of their effect in the submarket of dental equipment, the four acquisitions were in violation of the Act.

On April 20, 1970, plaintiff sought a preliminary injunction under Section 15 of the Act (15 U.S.C. § 25) and Fed. R. Civ. P. 65(a):

(a) requiring that during the pendency of this action the challenged acquisitions be maintained separate and independent from Healthco and from each other;

(b) enjoining Healthco from taking any other action during the pendency of this litigation, that would impair its ability to comply with an order of divestiture in whole or in part of the interest in such companies; and

(c) enjoining Healthco during the pendency of this litigation from acquiring the stock or assets of any dental dealer in Metropolitan New York.

On July 16, 1970, an order agreed to by the parties allowed the motion for a preliminary injunction to be withdrawn but granted in substance the preliminary relief sought.

On May 3, 1971, Healthco moved for an order permitting it "to merge into itself, its subsidiary dental supply corporations in the New York Metropolitan area which are referred to in this action".

The motion was granted by order of May 25, 1971. The mergers were to be without prejudice to the application of any final order of divestiture in this action.

Proposed findings of fact and conclusions of law, along with post-trial briefs, have been submitted by the parties. What follow are the findings of fact and conclusions

of law of this Court.

1.

Dental products consist of four categories of products: (1) dental equipment (equipment), (2) dental sundries (sundries), (3) artificial teeth, and (4) dental precious metals. Only the first two categories, equipment and sundries, are here involved.

Dental products are a recognized class of products or line of commerce within the dental industry.

Equipment consists of durable dental products used by dentists. Examples of equipment are dental chairs, dental units, X-ray machines, sterilizers, lights, cabinets, and darkroom equipment.

Equipment is a recognized submarket of the dental products market or line of commerce.

Sundries consist for the most part of non-durable consumable products such as materials for fillings, anesthetics, impression materials, waxes, cements, dental chemicals, non-precious metals and dental burrs. Sundries are also considered to include some durable products, for example, small instruments of under $100 in value. There are upwards of 20,000 different items which are classified as sundries within the dental products industry.

Dental sundries is a recognized submarket of the dental products market or line of commerce.

Dental products are distributed and sold almost entirely by companies classified by the United States Department of Commerce as "merchant wholesalers - dental supplies" or "merchant wholesalers - professional equipment and supplies". These "merchant wholesalers" have been referred to by the parties as "dental dealers" and this term is used herein.

Dental dealers sell dental products to dentists, dental laboratories, institutions (including hospitals and dental schools), and government agencies (collectively, sometimes called hereafter "dental customers").

There are two principal types of dental dealers - full line dealers and non-full line dealers.

A full line dealer sells equipment, sundries, precious metals and artificial teeth. A full line dealer arranges for the installation and servicing of equipment sold. The full line dealer sells all the dental items needed by dentists or dental laboratories.

Non-full line dealers are generally dealers who do not sell equipment and do not install or furnish services for equipment. These dealers concentrate on the sale of a broad line of sundries.

Between a full line dealer and a non-full line dealer as described, there are various dealers who sell sundries, equipment, and services for equipment, but who do not sell

artificial teeth and precious metals. Dealers offering equipment and services for equipment without a line of sundries are very rare in the market.

Dealers who sell equipment offer the following services to their customers: assistance of equipment specialists to aid dentists in planning the layout of their office; equipment mechanics to install large equipment; equipment repairmen who are able to visit the dentist or the laboratory; and management advice to dentists.

Nearly all dental dealers have salesmen who solicit sales personally from their regular customers. These salesmen make dental customers aware of new products and innovations in the dental industry.

Dealers generally fill their orders, particularly sundries, within two to five days of their receipt from salesmen. Delivery to the customers is usually by parcel post. Short term credit is available to customers.

Dentists, when opening an office, require the services of a dental dealer.

The impact of dental dealers is most significant on dentists, rather than on the other dental customers.

There are two major professional organizations of dental dealers: American Dental Trade Association (ADTA; which also has dental product manufacturers as members) and Dental Dealers of America (DDA).

It is moderately difficult to start a dental dealer business.

To be a full line dealer requires a minimum capital investment of $30,000 for equipment inventory and $20,000 for an adequate inventory of sundries; in addition, there must be working capital, and a physical plant.

A trained sales force, with specialists in the marketing, installation and repair of equipment, is necessary.

Difficulty is encountered in obtaining product lines from manufacturers.

3.

Mail order houses are companies which solicit sales of dental products through advertising in trade publications or their own catalogues sent to dental customers. They generally offer the same line of dental products as a non-full line dental dealer. They generally sell a full line of sundries.

While some items of equipment are sold by mail order houses, these are generally of the smaller type and such sales are not a significant factor in the equipment market.

Mail order houses maintain large inventories of dental products and sell at prices lower than those of dental dealers. They accept orders primarily by mail and in some cases by telephone. They do not rely on salesmen for the solicitation of orders.

Mail order houses offer delivery services and credit terms on a basis comparable to those offered by non-full line dealers. They do not offer, however, any of the special services of a full line dealer; for example, they do not install or

repair equipment.

The impact of the mail order houses is of increasing significance in the dental products industry. This impact is largely in the submarket of sundries.

Mail order houses purchase their products from manufacturers and to some extent from larger dental dealers, such as Healthco.

4.

Manufacturers of dental products are the prime suppliers of dental dealers and mail order houses.

Manufacturers play a significant part in the competitive aspects of the dental industry by control of the number of dental dealers which can sell in a given area. This factor appears strongest in the equipment market.

Dental dealers first entering a given geographic area have difficulty in obtaining access to manufacturers' product lines.

House brands are products made by the manufacturer for sale under private labels of the dental dealer.

Manufacturers make some direct sales to dental customers. These sales are not significant to dentists, but are concentrated to government, institutions and dental laboratories.

Manufacturers generally specialize in a specific type of product rather than in a broad line of dental products for sale to dental dealers.

Manufacturers do not install or supply services for equipment. However, installation and repair services are available from independent companies specializing in such services.

5.

The Metropolitan New York Area ("the Area") is made up of the following: New York City, the Counties of Westchester, Rockland, Nassau, and Suffolk in New York State, and the Counties of Bergen, Essex, Hudson, Passaic, Union, Morris, Somerset, and Middlesex in New Jersey.

6.

Rower Dental Supply Co. (Rower) was a Boston based dental dealer. Rower entered the dental industry in the Area by purchasing the assets of three S.S.White Co. dental dealer outlets. S.S. White Co., a large nationwide manufacturer and wholesaler of dental products, was required by an antitrust consent decree to divest itself of certain dental dealer companies. It sold three dental dealers in New York City to Rower, which took over the operations on January 1, 1969.

Rower, in January 1969, also acquired the assets of National Dental Supply Co. (National), a dental dealer partnership with a single outlet in New York City.

7.

Defendant Healthco at some time in early 1969, after January of that year, bought all of the stock of Rower; Healthco thus entered the dental industry in the Area by acquiring the

dental dealer businesses formerly operated by the three S.S. White outlets and by National.

The government does not challenge the purchase by Healthco of Rower.

8.

Healthco is a Delaware corporation which has its principal place of business in Boston and which transacts business in the Southern District of New York. It is engaged in interstate commerce.

On January 2, 1968, Healthco commenced doing business under the name of North American Nursing Homes, Inc. At that time, its business was limited to the maintenance of patient care facilities. In November 1968, the name of the corporation was changed to Healthcare and as already noted the name was further changed to Healthco, Inc. in about August 1971.

Healthco became engaged in the sale of dental and medical supplies and equipment, and the operation of dental laboratories.

Since January 1, 1969, Healthco has acquired about 30 dental dealers throughout the nation. It now has 59 dental dealer companies in 28 states, the District of Columbia, and Canada. Sales of these dental dealers were in excess of 38 million dollars in 1968, and 42.8 million dollars in 1969.

Healthco purchases in sufficient volume from manufacturers to obtain house brands.

Healthco as a nationwide chain of dental dealers has

ready access to manufacturers' product lines, and can purchase a large volume of products at favorable prices.

9.

The government here challenges the four dental dealer acquisitions by Healthco which were set out at the beginning of this opinion, namely, General, Secnter, Hebard-Metro, and Hebard Dental. It is not disputed that the acquisitions were made by Healthco as averred in the complaint.

General had a single outlet in New York City; Sechter operated two outlets, one in New York City and one in New Jersey; Hebard-Metro had an outlet in Syosset, Long Island; and Hebard Dental had an outlet in White Plains, New York.

The four dental dealers thus acquired by Healthco were all in the Area and all were, and continue to be, full line dental dealers. At the time of their acquisition, they were all engaged in interstate commerce and transacted business in the Southern District of New York.

10.

In 1968, before their acquisition by Healthco, the dental dealers later acquired (S.S.White three outlets, National, and the four just described) had sales in the Area as follows: all dental products - $9,239,000; equipment - $3,703,000; and sundries - $4,282,000.

In 1969 (the year of their acquisition by Healthco) the same dental dealers had sales in the Area as follows: all dental products - $9,847,000; equipment - $3,799,000; and sundries - $4,923,000.

In 1970, the same dental dealers had sales in the Area as follows: all dental products - $9,553,000; equipment - $3,667,000; and sundries - $4,873,000.

Since 1968 no new full line dental dealer has entered the market in the Area and only two insignificant non-full line dental dealers have entered that market.

11.

The government made a survey of dental dealers and mail order houses selling in the Area for the years 1968, 1969, and 1970. Questionnaires were sent to dental dealers and to mail order houses. Among other things, these asked for the dollar volume of sales in the Area of equipment and of sundries. The government relies heavily on the responses.

For 1968, there were responses: (a) from 55 dental dealers; and (b) from nine mail order houses, of which five were based in the Area and four were based outside the Area.

For 1969, there were responses: (a) from 50 dental dealers; and (b) from nine mail order houses, of which five were based in the Area and four were based outside the Area.

For 1970, there were responses: (a) from 51 dental dealers; and (b) from nine mail order houses, of which five were based in the Area and four were based outside the Area.

Of the dental dealers responding, about 28 were non-full line dealers.

Of the dental dealers responding, between 22 and 26 were full line dealers.

Questionnaires were sent to all dental dealers in the Area which belonged to DDA.

Questionnaires were sent to all dental dealers in the Area which belonged to ADTA. Dental dealers belonging to ADTA are estimated to account for 66% of the sales of dental products by all such dealers.

The government's survey covered all dental dealers in the Area which are of any significance. The dealers surveyed sell the overwhelming amount of their products within the Area.

Questionnaires were not sent to all mail order houses in the Area selling to dental customers in the Area.

Questionnaires were not sent to all mail order houses outside the Area selling to dental customers within the Area.

No evidence was introduced by Healthco to show the volume of sales of dental products of those mail order houses not covered by the survey. It is doubted that any mail order houses not covered by the survey sold in any year dental products for more than $100,000. No competitor of any significance in the Area was missed by the survey. In any event, sales of mail order houses which were missed by the survey would have slight meaning in the sundries submarket and no meaning in the equipment submarket.

The government made a special survey of manufacturers of dental products who sold such products to dental customers in the Area for the years 1968, 1969, and 1970. Questionnaires were sent to all such manufacturers as were identified by Healthco

in answers to interrogatories. Responses were received from more than 80 manufacturers. These showed sales by manufacturers to dental customers in the Area as follows: 1968 - $4,850,873; 1969 - $5,451,005; and 1970 - $6,020,315.

12.

The government contends that the four challenged acquisitions by Healthco violate Section 7 of the Clayton Act (15 U.S.C. § 18) because their effect may be "substantially to lessen competition, or to tend to create a monopoly" in the sale of dental products in the Area.

The "line of commerce" for which the government contends is the sale of dental products by dental dealers. The Area is argued to be an appropriate "section of the country for determining the effect of the acquisitions. Within the broad "line of commerce", the government argues that there are submarkets - equipment and sundries - in which the effect of the acquisitions may be measured. The theory of submarket measurement is based on the reasoning set forth in Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1961) and such later cases as United States v. Alcoa, 377 U.S. 271, 275-277 (1964).

A further argument is made by the government that the unique cluster of products and services sold by dental dealers separates them as a specific "line of commerce" in which the probable effects of the acquisitions should be measured. This argument is based on the reasoning in United States v. Philadelphia National Bank, 374 U.S. 321, 355-57 (1962).

The government must show: that dental products are a "line of commerce"; that the Area is an appropriate "section of the country" for measurement of the probable effect of the acquisitions; and that the acquisitions may substantially lessen competition in the broad dental products line of commerce or in the equipment submarket or in the sundries submarket.

As already noted, the government relies heavily on its survey of the dental products market and on the statistical exhibits based thereon. The method employed in making the survey is described in a memorandum opinion with order, filed December 18, 1973; the method was found to be proper and reliable.

Healthco contends that the line of commerce of dental products should include, in addition to those sellers surveyed by the government, all manufacturers and all mail order houses making sales of dental products to dental customers in the Area. It is argued by Healthco that the government has greatly underestimated the size of the dental products market and, therefore, has not shown that the four acquisitions may substantially lessen competition in any section of the country.

Healthco offers two main statistical theories to show that sales of dental products are far more than the government's figures set forth in Exhibits 32, 33, and 34.

The first theory involves the interpretation of data of the Census Bureau of the Department of Commerce for sales by "merchant wholesalers" in the Area.

The second theory involves a statistical analysis and

projection by Mr. David Ellis, an expert statistician who testified for Healthco. Mr. Ellis sought to measure purchases by dentists (non-salaried) and dental laboratories located in the Area of dental products. This he did by relying on various trade reports and surveys. The method employed and its weaknesses are described in a memorandum opinion with order, filed December 18, 1973.

13.

There is no dispute about the products which make up the "line of commerce". "Dental products" is a term of commercial importance and meaning. Dental products are distinct in use from other medical and surgical products used in the field of health care; they are not interchangeable with these other products. While dental dealers do sell such generally useful articles as paper cups and office furniture (articles available from many sources), these are a relatively small part of total sales; the great bulk of dental products possess distinctive characteristics.

The delineation of a submarket requires study of the following criteria: recognition of the products in such submarket as separate economic entities; distinctive usage and characteristics of such products; distinctive prices; and specialized vendors.

In the dental products industry, there are at least two submarkets: sundries and equipment. These fit the criteria indicated.

Both submarkets are treated as separate entities within the industry for accounting purposes and for census purposes; customer recognition and uses of the separate products in these submarkets are clearly distinct.

Equipment is marketed by dental dealers through a separate department. Dental dealers employ personnel specializing in the sale and servicing of equipment; they employ managers and mechanics for equipment. Unlike sundries, the sale of equipment requires a specialized vendor, the dental dealer, to establish local personal contact and to provide service to the customer. It is difficult to sell equipment by mail.

In United States v. Alcoa, already cited, the dissenting opinion of Mr. Justice Stewart (in which two other justices joined) was highly critical of the finding by the majority of a submarket as a "line of commerce" (377 U.S. at 281-87). The submarket found by the majority was aluminum conductor wire and cable within the broader line of commerce of aluminum and copper conductor wire and cable. See also, W. F. Upshaw, Relevant Market in Merger Decisions, 60 Nw U.L. Rev. 424 (1965). These criticisms have no application to a finding of equipment and sundries as submarkets of the broader market for dental products, this because equipment and sundries are natural and accepted subdivisions within the dental products market and have the classical indicia of a submarket.

14.

The parties sharply contest both the number of sellers

of dental products in the Area ("dental sellers") and the dollar volume of sales of dental products in the Area.

The government relies heavily on its statistical exhibits (Exs. 32 - 43) based on the responses to its questionnaires.

The statistical exhibits include reponses of mail order houses as well as dental dealers. Government counsel seem thus to include mail order houses as dental dealers, which is inconsistent with definitions sometimes expressed by a government witness (SM 202) distinguishing between dental dealers and mail order houses. In any event, the broader the definition of dental sellers, the more reliable will be the government's statistical exhibits.

On the record as a whole, it is concluded that the government's statistical exhibits present a reasonably accurate picture of the competition in the two submarkets; it must be remembered that no precise and accurate statistics are available.

The government in its statistical survey could have included four types of dental sellers: (a) dental dealers (full line and non-full line) based within the Area; (b) dental dealers (full line and non-full line) based outside of the Area but making sales to dental customers within the Area; (c) mail order houses based within the Area; and (d) mail order houses based outside the Area but making sales to dental customers within the Area. These four types will be discussed in an effort to see if there are significant omissions from the government's

statistical exhibits.

(a)

There were responses from 55 dental dealers used in the survey exhibits for 1968; from 50 dental dealers for 1969; and from 51 dental dealers for 1970.

The methods employed by the government to ascertain that this was a substantially complete covering of all dental dealers were reliable. The list of the dealers was compiled by Dr. Ritchin, a government economist, who constructed the questionnaires with his staff. They relied on the following source materials: membership directory of the DDA, 1968-69; ADTA membership list; answers to interrogatories by Healthco; and interviews with dental dealers selling within the Area. DDA and ADTA are the two organizations of dental dealers in the country. ADTA members make a significant percentage of sales of dental products by dental dealers; Mr. Ellis, a witness for Healthco, estimated that dealer members of ADTA account for two-thirds of dealer sales nationwide.

To show that the government has not covered accurately the dental dealers within the Area, Healthco relies on a segment of "Census of Business" (1967), a report prepared by the United States Department of Commerce. This report in relevant part seeks to define commodity lines for "merchant wholesalers" selling dental products from "establishments" located within the Area. These establishments specialize in the sale of dental products; general merchant wholesalers do not sell dental

products to any significant degree. The "Census" report stated that there were 118 such establishments within the Area which sold "Dental Equipment Supplies". From this, Healthco argues that the 50-55 dental dealer responses used by the government represent an understatement of the number of dealers in the Area and, therefore, cause an understatement of the dollar volume of sales of relevant products.

It should first be pointed out that the number of "establishments" is not the number of "dental dealers". The Census of Business states that "an establishment is not necessarily identical with the "company" or "enterprise" which may consist of more than one "establishment". Census of Business figures represent a summary of reports for individual "establishments" rather than for companies. A separate report was obtained for each location where the business of a company was conducted, including each location of multiunit organizations. Thus, every place of business of a dental dealer was considered a separate "establishment". Healthco's subsidiaries, for example, are listed as separate "establishments" in the "Census" reports, while the government exhibits treat each of them as one unit.

Within the term "establishments", the Census report includes firms that sell only to other wholesalers, importers selling merchandise at wholesale in the United States market, and exporters. These three categories are not shown to be competitors of any significance within the dental products

arket, and their exclusion from statistical exhibits is proper.

It is not conclusively established that the difference between the terms "dental dealer" and "establishment" is responsible for all of the difference between the Census of Business report and the government's statistical exhibits. Nevertheless, the careful effort made by the government to include all dental dealers within the Area compel a conclusion that there are no significant omissions from the government's dental dealer figures. Moreover, Healthco has not suggested the name of a single full line or non-full line dental dealer in the Area which was not included in the government's statistical exhibits.

(b)

The second of the four types of dental sellers is the dental dealer (full line or non-full line) located outside the Area but competing within the Area. These were not included in the government's survey.

While there may have been some such dealers located close to the boundaries of the Area, it is very doubtful that they accounted for any significant sales to dental customers within the Area. Customers, particularly dentists, are more likely to turn to local dental dealers for their purchases rather than to those from another area. Healthco in its cross-examination of Dr. Kitchin concentrated its attempt to show omission by suggesting deficiencies as to mail order houses, those

previously identified by a government witness (Mr. Walter) as competitors in the sale of dental products. No serious effort was made by Healthco to show that there were dental dealers located outside the Area which sold to dental customers within the Area. Omission of this type from the government's figures is not material.

(c) and (d)

The third and fourth types of dental sellers can be considered together. They are (c) mail order houses based within the Area and (d) mail order houses based outside the Area but making sales to dental customers within the Area.

Mail order houses are becoming more important in the distribution of dental products and the volume of their sales of such products is ever on the increase. Through advertising in their catalogues and in trade publications, mail order houses are able to cover a broader section of the country than the full line and non-full line dental dealer who relies on local customers generated by a sales force. Moreover, the attractive credit and delivery policies once unique to the dental dealer are being offered by the mail order houses; of course, with solicitation of orders by mail and with a wider area of the country to be covered, delivery time from placement of the order to receipt of the items is probably somewhat longer for mail order houses. Larger mail order houses enjoy price advantages because of the large volume in which they purchase from manufacturers. This advantage is passed along to the dental

customer. These competitive aspects of the mail order house have the greatest effect in the sundries submarket. The mail order houses are substantially equivalent to non-full line dental dealers: as already noted, the latter depend largely on the sale of sundries.

Mail order houses must be considered as included among dental sellers. The government recognized this and its statistical survey covered nine mail order houses, four based outside the Area. The sales of these mail order houses were almost exclusively confined to sundries; impact on the equipment submarket could be said to have been negligible.

The mail order houses to which the government sent questionnaires were selected in part from answers to interrogatories by Healthco concerning major competitors within the Area, and in part from interviews with dental dealers. These mail order houses, though considered competitors, never ranked higher in volume of sales than 20 on a list by sales volume of dental sellers. Only four mail order houses had sales in excess of $100,000; only these could be said to have any competitive impact in the dental products market. Three mail order houses had sales below $15,000 in each of the years surveyed: these could scarcely be considred significant competitors by any standard.

In its cross-examination of Mr. Walter and of Dr. Ritchin Healthco showed that there were some mail order houses not included in the government's survey but which could be

described as at least to some degree competitive with dental dealers. It was not shown, however, that any of these "competitors" could be considered to have any significance.

Although it appears that mail order houses selling in the Area are not completely covered by the government's statistical exhibits, the extent of any deficiency is entirely speculative and in any event seems confined to the submarket of sundries; any deficiency would have a negligible effect on the measurement of the equipment submarket.

15.

As already noted, the government made a special survey of the direct sales of manufacturers to dental customers in the Area. While the information is thus available, the government has not included it in the statistical exhibits. No reason is given for this; presumably, it is not believed that manufacturers are in competition with dental dealers. The Court has had to make its own study of the record and believes that direct sales by manufacturers are not significantly competitive with dental dealer sales.

There are over 300 manufacturers which primarily make dental products.

The major effort of these manufacturers is to sell their product lines to dental dealers and mail order supply houses, the prime channels for the resale of dental products. A survey introduced by Healthco indicated that direct sales by manufacturers to dentists for the year 1970 was only 3% of the

total dental products sold to dentists. Manufacturers recognize that they need dental dealers and mail order houses as a vital part of their distribution.

Direct sales of manufacturers involve certain specialized products, such as dental waxes and laboratory furniture. The impact of direct sales of these manufacturers is on dental laboratories, government and other institutions. The impact on dentists, the chief customers for dental products, does not appear to be of any importance. Dentists require a broad line of products and the kind of services which a dental dealer offers. Direct purchases from a number of manufacturers would not be practical for dentists.

Sales by manufacturers to larger customers, institutions or government are in part aided by dental dealers who provide delivery, installation and billing services. Manufacturers which sell equipment directly do not have their own service and installation departments (at least not as a general rule).

Healthco argues that the manufacturers' role in direct sales is of crucial importance in the assessment of the breadth of the market for dental products. It argues that there are 1,000 manufacturers with a potential for direct sales within the Area. The great majority of these manufacturers, however, do not offer even token competition to dental dealers. The government surveyed 95 manufacturers from a list based in part on Healthco's estimate of those manufacturers which it

considered to be competitors in the Area. All manufacturer members of ADTA from the Area were surveyed. Mr. Ellis testified that ADTA member manufacturers account for two-thirds of the production of dental products. The government adequately covered manufacturers selling in the Area.

While manufacturers do have some impact for some specific products on those dental customers who are not dentists, it is apparent that dental dealers and mail order houses are the significant competitive forces in any relevant line of commerce. The characteristics of dental dealers and mail order houses are sufficiently alike to be considered together. On the other hand, manufacturers making direct sales of specific types of dental products to a limited class of customers, a class relatively unimportant, are not properly a part of the same grouping. The most important class of customers, the dentists, do nearly all their buying from dental dealers and mail order houses.

16.

The statistical exhibits of the government (Exs. 32 - 43, 45) based on the responses (Exs. 31, 31A, 44) to questionnaires (Exs. 26, 28, 30) are accepted as reasonably accurate for use in measuring the submarkets of sundries and equipment.

17.

The evidence for Healthco to show its measurement of the relevant market has been examined and considered. The

Healthco measurement of the market relied primarily on the "Census of Business", already noted, and on the opinion and estimates of Mr. Ellis based on trade surveys and reports. Mr. Ellis estimated (SH 416) that dental purchases by active non-salaried dentists and dental laboratories within the Area were $60,200,000 for 1968, $66,100,000 for 1969, and $68,500,000 for 1970. This is to be compared with the statistical exhibits of the government (Exs. 32, 33, 34) showing sales to dental customers in the Area of $31,305,000 for 1968, $32,911,000 for 1969, and $31,600,000 for 1970. The method employed by Mr. Ellis may be arithmetically correct, but the data on which his estimates were based cannot be accepted with any confidence, for the reasons (among others) set out in the Court's opinion filed December 18, 1973. The data are taken largely from trade reports and surveys of the dental products market in which Mr. Ellis had no part; the defects in the several Healthco statistical exhibits were pointed out in the Court's memorandum opinion filed December 18, 1973.

No individual who constructed any of the trade surveys was called as a witness; the validity of the method and of the statistics could not be properly assessed. In short, the estimates of Mr. Ellis and the Healthco statistical exhibits cannot be accepted as an accurate measure of purchases of dental products within the Area.

At best, Healthco's statistical evidence and the testimony of Mr. Ellis create an inference that the government's

statistical exhibits failed to give the full extent of the market, especially in respect of sales of sundries by mail order houses. The amount of any deficiency, however, is highly speculative and would not detract from the reasonable accuracy of the government's statistical exhibits.

Dr. Gould, an economic consultant witness for Healthco, was an impressive witness but his estimate of $89,200,000 as the dollar sales of "dental equipment and supplies" for 1968 in the Area is not believed to be sufficiently accurate for acceptance.

18.

Is the Area a relevant and proper "section of the country" (15 U.S.C. § 18) in which to measure the probable effects of the challenged acquisitions on competition in dental products?

Healthco's contention is that the measurement should be in the nationwide geographic market. It contends that dental customers in the Area can and do seek dental products from nationwide sellers just as readily as they seek such products from sellers located within the Area. Reliance is again placed upon the statistical analysis of Mr. Ellis.

Healthco at the same time maintains that the Area is too broad a "section of the country" in which to measure competition amongst dental dealers. It asserts that dental dealers are strictly local and do not compete throughout the entire Area.

Delineation of a relevant "section of the country" for

Section 7 analysis does not require a precise geographic area from which other sellers of products are totally isolated. United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966). It need only be shown that the merger may substantially lessen competition in any section of the United States. Because a geographic market should "'correspond to the commercial realities of the industry' and be economically significant" (Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962)) rather than refer merely to geopolitical boundaries, there will be some vagueness of boundaries in any delineation.

Judge Weinfeld, in United States v. Bethlehem Steel Corporation, 168 F.Supp. 576, 602 (S.D.N.Y. 1958) summarizes the matter as follows:

> "An economically significant area in an industry cannot be determined with the precision of a surveyor. In considering the anti competitive consequences of a merger there is nothing sacred about the boundary lines of a state. The impact may manifest itself in an appreciable segment of a market which may coincide with a political subdivision of a state, a state, a combination of states or the nation."

The New York Metropolitan Area (made up of some seventeen counties, as already described) is an appropriate "section of the country" in which to study the effects of the four challenged acquisitions of Healthco.

From the point of view of full line and non-full line dental dealers the Area represents a rough approximation of the area of effective competition. The companies acquired by Healthco (except for Hebard Dental) make 99% of their sales within the

Area (Hebard Dental sells 72% within the Area). Dental dealers, relying heavily on business generated by a sales force working in the field, can cover the Area. Dental dealers located at one boundary of this market are responsive to price changes (reductions) by other dealers in a different part of the Area. Smaller dealers (employing one or two salesmen) are limited to a smaller part of the Area.

Healthco has shown that mail order houses sell within the Area from other parts of the country; there is no showing that such sales are in volume sufficient to make the Area an irrelevant "section of the country" in which to analyze the mergers. While the mail order houses are competitors from beyond the Area, the overwhelmingly significant competition is from locally based dental dealers. Even if the mail order houses were a significant enough factor in competition to justify the finding of a national market, the Area would be a clear geographic submarket in which it would be appropriate to measure the effect of the mergers in question.

It is somewhat inconsistent with its "section of the country" theory for the government to include among dental sellers in the Area mail order houses from outside the Area. This does not affect the conclusion that the Area is an appropriate "section of the country". It may be noted also that the impact of mail order sales from outside the Area is insignificant as far as equipment is concerned.

Another argument for Healthco is that many dental

dealers are not large enough to cover the Area; nearness of the dealer and his sales force to customers is said to be crucial. While smaller dealers are obviously limited to a segment within the Area, the four dealers acquired by Healthco were competing with Healthco in most, if not all, parts of the Area. There is no need to show that each competitor in the universe is in direct competition with every other competitor.

The Area is recognized by the Bureau of Census as a significant section of the country for measuring the sales of "merchant-wholesalers". Customers within the Area, particularly dentists, purchase the bulk of their dental products within the Area. Despite the fact that purchasers can for some products turn to sources outside the Area, its choice as a "section of the country" to which to study the anti-competitive effects of the challenged acquisitions represents a reasonable compromise reflecting the commercial realities facing purchasers and sellers.

. 19.

The test to determine whether there is a violation of the Act is the effect of the acquisition: whether it "may be substantially to lessen competition, or to tend to create a monopoly" (15 U.S.C.§ 18). This effect may be studied within submarkets of the broad "line of commerce".

The government's papers occasionally refer to the probable effect on the mergers as "tending to create a monopoly"; this expression has in the past been rarely used and is little

understood. The emphasis of the government's arguments was that the mergers "may substantially lessen competition".

There are four separate acquisitions here under attack, but they may be viewed in the aggregate since they are close in time, in area, and in product market. Section 7 of the Act does not require that each acquisition be examined separately; they may be evaluated for their combined effect. A discussion of the legislative history on this point, with reference to some precedents, appears in Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F.Supp. 780, 794 (S.D.Tex. 1971).

The submarket of dental equipment was measured to an accurate degree of reliability by the government's survey. The deficiency, if any, in the government's survey of the sundries submarket is a separate matter. As already found, the statistical exhibits for the government give an accurate view of Healthco's influence on the equipment submarket.

Healthco entered the equipment submarket in 1969 by purchasing the former outlets of S.S.White in New York City. Those outlets were eleventh in the list by volume of sales of dental dealers of equipment in 1968 (Ex. 38). At the close of 1969, Healthco, after having acquired in that year the four companies noted, was first in the list by volume of sales of dental dealers of equipment, having more than four times the volume of sales as its nearest rival (Ex. 39). Healthco sold about 36-37% of all equipment sales in 1969. In 1970, Healthco's share of this market rose slightly to 38.5% (Ex. 40).

The four acquisitions by Healthco eliminated as competitive factors in the dental equipment market the competitors ranked first, third, sixth, and eighth in list by volume of

sales of dental equipment by dental dealers in 1968. Other competitors have dropped out of the dental equipment market since then. The effect of Healthco's acquisitions on competition in the dental equipment market is not subject to speculation; it has been substantially lessened. This is in a market where concentration of dental equipment sales amongst the top four, top eight and top ten competitors is heavy.

The statistical analysis of the dental equipment submarket shows that Section 7 of the Act has been violated by the four acquisitions here at issue. The analysis is supported when account is taken of the unique requirement of the dental equipment market, namely, that there be a local dental dealer who can provide services and repairs to the customer.

While statistical analysis (market share, ranking, and concentration) is an important starting point in assessing the probable effects of acquisitions, 'the merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future'. United States v. Continental Can Co., 378 U.S. 441, 458 (1964)

An important element in the structure of any industry is the ease (or not) of entry to that industry. Healthco argues that there are relatively low barriers to entry by full line and non-full line dental dealers. Thus it contends that there is no probability that its acquisitions will lessen competition, even in the dental equipment submarket.

Entry into the equipment submarket is not foreclosed

by patents or by technological reasons. There are economic barriers. Equipment product lines are not readily available from manufacturers. Equipment departments require trained specialists in the sale and servicing of equipment; in addition other managerial expertise is required.

Healthco's advantage in the Area from its control over the acquired outlets is magnified by its nationwide status as a large dental dealer.

Entry to the equipment submarket by a dental dealer selling equipment only is not economically feasible. Capital requirements in excess of $100,000 are required for a dental dealer who wishes to offer full equipment and sundries lines.

There has been no significant entry, since 1963, into the full line dealer or non-full line dealer. This has its greatest effect in the equipment submarket. While sales of mail order houses have increased, they are primarily sellers of sundries. The number of sellers of dental equipment dropped to 33 from 38 prior to the challenged acquisitions.

The conclusion is compelled that Healthco's four acquisitions have, and will continue to have, the effect of substantially lessening competition within the submarket of dental equipment. Thus, there has been a violation of Section 7 of the Act.

20.

There is a different picture in the submarket of dental sundries. The influence of sales of sundries by mail

order houses means that the statistical exhibits of the government are less accurate for this submarket. There are also different structural elements.

Healthco entered the sundries submarket in 1969 by acquiring Rower and its four subsidiary outlets in the Area. These together sold about $861,000 worth of dental sundries in 1968. This placed them collectively as among the top eight dealers in sundries for 1968. During 1969, Healthco acquired General (No. 5 in sundries), Secnter (No. 4), Hebard-Metro (No. 6), and Hebard Dental (No. 10). At the end of 1969, Healthco had about three times the volume of sales of sundries as its nearest rival. This remained at about the same level for 1970.

The government's survey for 1969 and 1970 showed that Healthco had 25.4% of the dental sundries market. However, there are believed to be omissions from total sales of sundries and there can be no acceptance of the statistical exhibits as showing accurately Healthco's shares of the dental sundries submarket in 1969 and 1970. The share is speculative.

As indicated, there are marked differences in the structure of the dental sundries submarket from that of the equipment submarket. Entry barriers to sell dental sundries do not appear as great. Mail order houses are recognized by dealers as an increasing force in the dental sundries submarket. No trained service force and no specialists are required in the sundries submarket. This submarket as covered by the government's

survey shows no significant concentration of sellers; there are in 1970, 57 sellers in this submarket and the evidence suggests strongly that mail order houses would add significantly to the number of sellers. Moreover, there has been some shift by full line dealers away from that status; for example, Dental Equipment Specialist shifted from full line dental dealer to mail order house.

In the dental sundries submarket, the share controlled by Healthco, the increasing trend of mail order houses as a competitive force in this market, and other evidence satisfy this Court that Section 7 has not been violated by the four challenged acquisitions.

21.

Dental equipment and dental sundries account for the great bulk of all dental products sold. The government does not contend for any effect of the challenged acquisitions on the submarkets of artificial teeth or dental precious metals.

There seems no need to consider or make separate findings as to the broad line of commerce of "dental products".

22.

There is a suggestion by Healthco (Post-Trial Brief, pp. 45, 46) that General and Sechter were not, when acquired, "vigorous" or "formidable" competitors. This does not appear to invoke the "failing company doctrine" (Citizens Publishing Co. v. United States, 394 U.S. 131, 136 (1969)), for which there is not the slightest support in the evidence. However, Healthco

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properly draws attention to the competitive stance of General and Sechter when acquired; this is relevant to the effect on competition of their acquisition. The facts show that General and Sechter were not on the verge of collapse when acquired but were independent competitive forces whose elimination had the effect of substantially lessening competition.

23.

Consideration has been given to United States v. General Dynamics Corporation, 415 U.S. 486 (March 19, 1974), decided while the case at bar was under advisement. By a 5 to 4 vote, the Supreme Court held that General Dynamics did not violate Section 7 of the Act when it acquired the controlling stock of United Electric Coal Companies (United). The decision was drawn to the attention of this Court by counsel for Healthco, who stated that the "rationale and holding of the case is of central importance in the instant case".

General Dynamics concerned the coal industry. The government relied on statistical evidence to show that there was concentration in that industry, that the concentration was increasing, and that acquisition of United Electric would increase the market share of General Dynamics and contribute to the concentration trend. The Supreme Court majority upheld a finding of the District Court that, despite the statistical evidence, 'other pertinent factors' required a conclusion that 'no substantial lessening of competition occurred'. These other factors were discussed but, the industries being different, no

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purpose would be served by analysis here.

Healthco relies on the principle and asserts that there are "other pertinent factors here". These, it says, are "dramatic changes" in the dental industry because of the increasing importance of "mail order sellers and manufacturers who make direct sales".

The difficulty is that whereas the changes in General Dynamics had already taken place and were undisputed, the changes here claimed are in the future and are speculative. There is little, if any, evidence that such changes as may occur will diminish significantly the competitive position of the full line dental dealer.

It is not believed that the General Dynamics decision affects any of the conclusions above stated in the case at bar.

24.

The effect of the four challenged acquisitions by Healthco will not substantially lessen competition in the sundries submarket of the dental products industry but will substantially lessen competition in the equipment submarket of that industry. The four acquisitions are thus in violation of Section 7 of the Act.

Settle judgment on notice.

Dated: New York, New York
JAN 14 1975

INZER B. WYATT
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

HEALTHCO, INC., (formerly known as Healthcare Corporation)

Defendant.

70 Civ. 1312 I.B.W.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein, on April 2, 1970, and after a full trial on all issues of liability, and the Court having rendered its opinion, findings of fact and conclusions of law herein on January 14, 1975:

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter herein and the parties hereto.

The effect of the acquisition by Healthco, Inc. (Healthco) of the assets of General Dental Supply Co., Inc. (General), M.A. Sechter Dental Equipment & Supply Co., Inc. (Sechter), Hebard Dental Supply Co., Inc. (Hebard Dental) and Hebard-Metro Dental Co., Inc. (Hebard-Metro) may be substantially to lessen competition in the sale of dental equipment by dental dealers in Metropolitan New York, in violation of Section 7 of the Clayton Act (15 U.S.C. § 18), as amended.

II.

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, corporation, association, or other business or legal entity; and

(B) "Dental products" shall mean dental equipment, dental sundries, artificial teeth and dental precious metals.

The provisions of this Final Judgment shall apply to defendant, its officers, directors, agents and employees, and to each of its subsidiaries, successors, and assigns, and to each of their respective officers, directors, agents and employees, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

(A) Defendant is ordered and directed, within ninety (90) days from the date of entry of this Final Judgment, to take such steps as may be necessary to re-establish and to operate the business formerly operated by General Dental Supply Co., Inc. (General), M.A. Sechter Dental Equipment & Supply Co., Inc. (Sechter), Hebard Dental Supply Co., Inc. (Hebard Dental), and Hebard-Metro Dental Co., Inc. (Hebard-Metro) as separate, viable dental product retailers, independent of each other and of defendant.

(B) The companies established pursuant to subsection (A) of this Section IV shall consist of those assets as were utilized in the conduct of the business of General, Sechter, Hebard Dental, and Hebard-Metro respectively, at the time of the acquisition by Healthco, together with such improvements, betterments, replacements and all other assets which have been added to such business by Healthco. If the divestiture ordered by this Final Judgment requires the use by the divestee of a facility or assets essential to the operation of the divestee's business, Healthco shall transfer such facility or assets, or a suitable replacement facility or assets therefor, to the companies established pursuant to this Section IV.

V.

(A) Healthco is ordered and directed to divest, within fifteen (15) months from the date of entry of this Final Judgment, all of its interests in the companies established pursuant to Section IV of this Final Judgment to a purchaser or purchasers first approved by the plaintiff, or failing such approval, the approval of the Court after thirty (30) days prior notice to the plaintiff;

(B) Healthco shall make known the availability for sale of the companies to be divested by the usual and ordinary means for the sale of a business including the placing of advertisements in the trade magazine "Proofs," and shall on an equal and non-discriminatory basis furnish to each bona

fide prospective purchaser all necessary information, including financial and business records, regarding such companies, and shall permit prospective purchasers to have access to and make such inspections of the physical premises of such companies as may be reasonably necessary for accomplishing the divestiture ordered herein;

(C) For a period of two years from the date of divestiture, Healthco shall use its best efforts to assure that all suppliers with whom it does business shall continue to offer its products for sale to the divested company. If during such period the divested company becomes unable, for any reason other than failure of credit, to purchase dental products from any such supplier and such supplier continues to supply such products to defendant, the defendant shall offer to sell such products to the divested company at cost during such period;

(D) Healthco is enjoined and restrained from reacquiring any of the companies or assets, or any part thereof, divested pursuant to this Final Judgment, provided, however, that Healthco may retain a bona fide security interest in any of the companies or assets divested given to secure the payment of the purchase price therefor, and if Healthco should reacquire any of the companies or assets divested pursuant to this Final Judgment, Healthco is ordered to divest such reacquired company or assets in accordance with the provisions of this Final Judgment within one (1) year from such reacquisition;

(E) The time period set forth in Section V(A) of this Final Judgment shall be tolled during the pendency of any proceeding in this Court under this Final Judgment relating to approval of a proposed sale which delays the consummation of the divestiture transaction proposed by Healthco.

VI.

(A) Healthco is ordered and directed to agree, upon the request of the purchaser of a divested company, that: (1) it will not, for a period of two (2) years from the date of the closing of any divestiture made pursuant to this Final Judgment, without the consent of the purchaser, employ any personnel who at the time of such divestiture or at any time within two (2) months prior thereto, were employed at the company divested; (2) it will refrain for the said two (2) year period from soliciting sales from any person who has purchased dental products from a divested company in the

year prior to completion of such divestiture; and (3) it will use its best efforts to assure that all suppliers from whom it purchases dental products will continue to offer their products to the divested company, and will take no actions to influence or suggest in any manner that such suppliers discontinue such sales to a divested company.

VII.

If the divestiture ordered by this Final Judgment has not been completed within fifteen (15) months from the date of entry of this Final Judgment, the Court, upon application of the plaintiff, shall appoint a trustee who shall have authority to divest, as soon as possible, all of Healthco's remaining interests in the companies not divested, subject to the Court's supervision, after hearing the parties hereto on any issues presented. Said trustee's costs and expense shall be borne by Healthco.

The trustee shall have the authority to assign, at Healthco's expense, additional assets to any company remaining to be divested, which in his opinion will enable him to promptly complete the divestiture ordered by the Final Judgment, provided that he shall first obtain the approval of the Court.

VIII.

(A) Healthco is enjoined and restrained for ten (10) years from the date of entry of this Final Judgment from acquiring, directly or indirectly, any financial interest in or any assets (except in the normal course of business), business, goodwill or capital stock of any other person engaged in the sale of dental products without the prior approval of the plaintiff, or the approval of the Court upon notice to the plaintiff, and upon a showing that the effect of such acquisition will not be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of dental products.

(B) In the event Healthco desires to make an acquisition as set forth in subsection (A) of this Section VIII, it shall so notify the plaintiff in writing not less than forty-five (45) days prior to the closing date of such transaction, and shall provide plaintiff with the complete details thereof. Within twenty-five (25) days from the date on which Healthco notified plaintiff of the proposed acquisition, plaintiff may request in writing additional information from Healthco which shall also be furnished in writing.

Plaintiff shall, within twenty (20) days following receipt of any additional information requested, advise Healthco in writing of any objection plaintiff

may have to the proposed transaction, which shall not be consummated unless Healthco obtains the approval of the Court or plaintiff's objection is withdrawn. If plaintiff does not object to the proposed acquisition, it may be consummated.

IX.

Within ninety (90) days of entry of this Final Judgment and for every two (2) months thereafter, Healthco shall file written reports with the plaintiff setting forth the steps taken to comply with Sections IV and V of this Final Judgment. Such reports shall include detailed information regarding the steps taken to re-establish the independence of each of the companies to be divested and the efforts made to effectuate their sale including the names and addresses of all persons who have expressed interest in the purchase of such companies and the terms of any offers made to Healthco.

X.

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege, and subject to the presence of counsel if so desired:

(1) Access during its office hours to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession of or under the control of the defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of defendant and without restraint or interference from it to interview officers or employees of defendant regarding any such matters.

Defendant, upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports to the Department of Justice with respect to any matter contained in this Final Judgment as may be requested from time to time. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the

plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of determining or securing compliance with this Final Judgment or as otherwise required by law.

XI.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XII.

Plaintiff shall recover costs of this action from Healthco.

Dated:

UNITED STATES DISTRICT JUDGE

dhds

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-vs-	70 Civ. 1312
HEALTHCO, INC.,	
Defendant	

New York, New York
April 1. 1975--3:00 p.m.

Before:

HON. INZER B. WYATT,
District Judge

APPEARANCES:

JOHN SIRIGNANO, ESQ.,
MELVIN LUBLINSKI, ESQ.,
EDWIN WEISS, ESQ.,
Department of Justice,
Anti-trust Division,
Attorneys for the United States of America

WINSTON & STRAWN, ESQS.,
Attorneys for Defendant
BY: EDWARD L. FOOTE, ESQ., of Counsel

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THE CLERK: United States of America v. Healthco.

THE COURT: In this matter, I filed an opinion on January 14th of this year, and after setting forth, for better or for worse, the findings and conclusions, I directed that a judgment be settled on notice.

This is a very old matter. It was an old matter when I got it, and for many reasons it took a long time after the case was tried for me to dispose of it.

Then I had supposed that in the light of the opinion of the Court that the parties would at least discuss the matter -- maybe they did -- but nothing was done for about two months. And then on March 13th, at two ~~minutes~~ months after the opinion was filed, the Government served a notice of settlement of the final judgment on March 21st.

Now, the first two questions that I have are: Why did it take two months to submit a judgment? And second, did the parties discuss the matter before the judgment was submitted?

MR. SIRIGNANO: Your HOnor, with respect to the first question, as to the taking of two months, there are certain procedures within the Justice Department which call for the presentation by any staff to their superiors in Washington of any judgment. I can tell your Honor that in the amount of time which passed it went through the

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process in Washington.

As to the second question, I cannot say that there were any serious discussions as to the terms of the order with the defendant. On the two or three occasions some conversations were had with representatives of the defendants, almost the first thing stated was in the opinion of the defendant that the Government was not, under the terms of your Honor's opinion, entitled to ~~toll the~~ total divestiture. With that sort of an impass, your Honor, we felt that there was no purpose ~~of~~ in having any further discussions.

THE COURT: Well, the Justice Department, from where I sit, needs a complete and total shakeup, and I hope with new blood it will get it. The Department of Justice, from my observation, is just slow, clumsy, club-footed, obstructive, obstreperous, medieval. It needs a complete overhauling. Just a vast spawning bureaucracy, the Justice Department.

As for the discussion of the matter, it is most disappointing.

Then, on the 21st apparently the defendant filed with the Clerk a notice of counterproposal. A copy was sent to me with a letter dated March 19th, counsel for the defendant assuming that my day is complete when

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I have lots of correspondence to answer, and that the Court can be dealt with by correspondence. Just as disappointing a performance on the part of the defendant.

Then the defendant suggests that the case was tried on the issue of liability alone, so one of the purposes for which we are met today is: Where was the order that the case was tried on? I understand that in some civil actions there is an order the case will be tried on the issue of liability alone, and we will reserve the issue of damages. Was there such an order in this case?

MR. FOOTE: May it please the Court, my name is Ed Foote. I would like to --

THE COURT: Yes. And the answer is either yes or no.

MR. FOOTE: Well, I believe there was an order.

THE COURT: When was the order made? Remember, I inherited this case, so I do not know. I do not want to be unfair or unjust. If there was an order that said that we were trying it on liability alone, I would like to know about it. I do not remember ever hearing of that before.

MR. FOOTE: Your Honor, may I try to reply to that?

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THE COURT: Of course. But I want information. I want who made the order, when was it filed.

MR. FOOTE: Your Honor, there was no specific order that states that. There was an order entered pursuant to plaintiff's motion for a preliminary injunction, which was dated April 20, 1970, and on July 16, 1970, and I am paraphrasing, if the Court please, from Page 3 of your Honor's opinion, and among the things that was stated at that time, I will quote from (b):

"The motion was to enjoin Healthco from taking any other action during the pendency of this litigation that would impair its ability to comply with an order of divestiture, in whole or in part, of its interest in such companies."

This was a motion, your Honor, filed by the Government and there was an order entered after the parties discussed that on July 16, 1970. It is our position, your Honor, that the subject of what to divest, whether it is an entire divestiture or a partial divestiture, was surely contemplated by the parties and reflected in an order of July 16th. There is no express order which reserves that.

However, if your Honor --

THE COURT: Then I consider the present suggestion frivolous. All right. So that is that.

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Then the defendant submitted a trifling order which simply ignored any of the issues in connection with the final decree, and instead simply says -- again, I suppose the defendant is seeking to prolong, delay, obstruct, as far as possible, knowing that this is a busy court -- once the plaintiff directed to prepare a proposed final order and memorandum which will give effect within 15 days.

Now, the defendant suggested this at a time when the Government had already submitted a proposed order. Now, what excuse do you have for such a submission?

MR. FOOTE: Your Honor, I called Washington to talk to Mr. Rashid on three different occasions to discuss a form of order. I also discussed on the telephone the form of this order with Mr. Sirignano.

I was told that it would be pointless to have such a discussion because they were simply going to ask for total divestiture.

THE COURT: That is right. Why didn't you come up with some counterproposal?

MR. FOOTE: Because I believe, your Honor, and I believe I can demonstrate if your Honor wants to hear me, that in order to do that the Court has to hear additional evidence, and I am not saying that, notwithstanding the Court's comments, to delay this matter. I do not think

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that the defendant has done anything to delay this matter. Indeed, I called Washington to work the matter out. I cannot help it if the circumstances have changed. I cannot help it that I do not believe the record, as it stands, provides enough information for this Court to enter such an order, and I would respectfully --

B2 THE COURT: You were the ones who made the record. Nobody prevented you, nobody offered evidence that was excluded.

MR. FOOTE: That is true, your Honor.

If I may, your Honor, I think in the famous case that all of us have cited, the Brown Shoe case --

THE COURT: Please do not cite cases. I am not interested in the cases.

MR. FOOTE: Your Honor, I wanted to suggest to the Court that in other cases of this kind that has been the procedure that was followed. And in the most celebrated case that we all use in Section 7 litigation, the Brown Shoe case, that is just what the Judge did. I will not cite it if the Court does not want to hear it.

THE COURT: Look, I know the case. My firm was counsel in the case. I know the case perfectly well.

MR. FOOTE: Thank you, your Honor. In that case, the trial Judge --

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THE COURT: I am not ignorant of it.

MR. FOOTE: I did not suggest you were, your Honor. I was suggesting to the Court that a hearing after the evidence on liability is just exactly what happened in that case, and I think that in view of the fact that the acquisitions occurred in 1969, and in view of the fact that your Honor wants to put into effect some kind of an order which will cure the harm to the public, that your Honor has seen in listening to the evidence, that it was our view -- and if anyone has a responsibility for that, it is me -- that it was our view, my view, if the Court please, not Mr. DeMarco's or anyone else, but my view that it would be in the interests of the Court before the ultimate remedy of divestiture to know what kind of divestiture, what property to divest, how to take care of the situation, that your Honor would indeed want to hear evidence of the status of the business today, of how it would be best to carve out some kind of a company to free float it in this market, to cure what your Honor finds to be our competitor. I wanted to discuss this with the Justice Department and they would not discuss it with me.

THE COURT: Why didn't you send a proposed order? What have you been waiting for?

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MR. FOOTE: Well, your Honor --

THE COURT: You understand we work for a computer. I have tried to make this clear, we work for a computer. This is a 1970 case; it has to be gotten rid of.

MR. FOOTE: Your Honor, I have not submitted an order because --

THE COURT: No, you have made no proposal at all.

MR. FOOTE: Yes, we have, your Honor.

THE COURT: No, you have not. I beg your pardon. I have read your order.

MR. FOOTE: We have not made a proposal --

THE COURT: You just say I embark upon a hearing.

MR. FOOTE: And we would like one, your Honor.

THE COURT: I am not going to have a hearing until you come up with some proposal.

MR. FOOTE: My proposal,your Honor, if I may --

THE COURT: Is to just have a hearing.

MR. FOOTE: No, it is not, your Honor. My proposal is that the company, in view --

THE COURT: Just let it go on just as it was?

MR. FOOTE: No, your Honor. That is not it.

THE COURT: What is your proposal and how long

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will it take you to come up with it?

MR. FOOTE: Well, I can file it tomorrow.

THE COURT: Why haven't you filed it before today?

MR. FOOTE: Because, your Honor, that again is my problem. I thought that your Honor was going to have a hearing to develop facts to determine what kind of an order to enter. If there is anybody responsible for that, it is not anybody but me.

THE COURT: Well, it is a pretty sorry performance, isn't it?

MR. FOOTE: Your Honor, I did not look at it that way, but I obviously understand how this Court feels about it. But, your Honor, my problem was that we were willing to sit down and work the thing out with the Government, and the option I had was either to accept total divestiture, that they were not going to meet with me, and they told me that, and I thought that your Honor would want to have evidence. And, frankly, our proposal would be to create a company, put it in business, and restore that degree of competition that your Honor has found. But it is a very difficult proposition because we have to analyze what we have left from Sechter, what we have left from the other companies that we acquired.

If I may just digress a moment, your Honor,

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one of the problems I see in this: Take General, we can divest General. There are some assets left. Whatever is left we will, of course, divest, if that is this Court's wishes.

As your Honor will recall, General --

THE COURT: No, I do not recall any of the details, but the situation was fairly clear. Is there any reason on earth why you could not get rid of all the dental equipment business?

MR. FOOTE: Yes, your Honor.

THE COURT: Why not?

MR. FOOTE: There is a reason why we should not do that.

THE COURT: But that was the violation.

MR. FOOTE: Your Honor, we can get rid of the dental equipment business, and then will that improve the condition of competition? Let us take a dentist, a new dentist. He is coming out of the dental school and he wants to buy new equipment, ten, twenty thousand dollars of equipment to set up business.

THE COURT: Look, isn't your alternative either total divestiture or divestiture of the dental equipment area? Isn't that it?

MR. FOOTE: No, your Honor.

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THE COURT: Isn't it pretty simple?

MR. FOOTE: Those are two alternatives. I would respectfully suggest to the Court there is a third.

THE COURT: Yes, just let you go scot-free. Then the Supreme Court may let you do it. That is pefectly all right with me.

MR. FOOTE: Your Honor, I doubt very much the Supreme Court is going to be interested in this matter. But I do have another suggestion.

THE COURT: Yes. All right? What is it?

MR. FOOTE: That is, instead of just having us get out of supplying of dental equipment, which was one of the options that your Honor suggested, what difference will it make to the dentists if somebody else owns these entities instead of us? They still are going to have to deal with one company.

Your Honor, my suggestion was that we take the business that we acquired and take the business that we acquired after the acquisitions; keep us in the business and create a new company so that we are both in the business. And that way competition will not only go back to the way it was, assuming the condition that your Honor thought originally, that we have too much of the dental equipment business, but it would keep two people in the

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business.

Your Honor, the Government statistics show that at the time we entered this business by acquiring --

THE COURT: But under your suggestion now, would you continue in the dental equipment business?

MR. FOOTE: Yes, sir, as one --

THE COURT: No, I won't permit that.

MR. FOOTE: Will you hear evidence on that?

THE COURT: No.

MR. FOOTE: Your Honor, may I have leave to file an offer of proof on that?

THE COURT: Yes. Of course you may.

MR. FOOTE: thank you.

B3 THE COURT: Now, of course the Government is rediculous to say that you have to get out of all business.

Will you please sit down, sir?

The Government says although they only own twenty-five or thirty percent, they should have one hundred percent victory. I am not going to permit that.

But the Department of Justice, being what it is, unless the Bench is alert the Department of Justice will get away with murder of the rights of citizens. But that is the way it operates.

Now, how long will it take you to come up with

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some proposal? Of course, I am going to give you a chance to present something that could carry out this rather difficult matter, but what can be done about it practically?

You see, if you say we will transfer part of our business, we will keep the dental equipment business, but we will transfer part of it and we will create another company and we will sell it to somebody, the Government will come back and say, but still they have got the vast power, which has been accumulated by this, and within two or three years we predict this will wither on the vine. And we cannot go on beating this dead horse much longer.

MR. FOOTE: Your Honor, I --

THE COURT: Now, there should be some way, and frankly obviously I was naive. I thought that the parties would long ago have sat down and agreed that the dental equipment business, which was the crux of the matter, would be transferred to some other entity and either sold in public or private sale, and that would be the end of it.

MR. FOOTE: Your Honor --

THE COURT: But that was not to be done and I certainly do not attempt to appraise the blame. I am as such disappointed with the Department of Justice as I am with the defendant.

MR. FOOTE: Well, I take exception, your Honor,

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but with due respect, to any blame that would come on me because of that, because I cannot force the Government to meet with me.

THE COURT: No, of course not. But you could have come up with a suggestion. The day after the opinion was filed there was no reason that you could not have submitted a proposal.

MR. FOOTE: Your Honor, the day after the opinion was filed and for sometime thereafter I was under the opinion, which I believe your Honor has also shared, that we would sit down and work out such an order. And therefore, I do not feel that the inability to do that is any part of my responsibility.

THE COURT: I have not said that it was. I have said I am just disappointed in the Government as in the defendant.

MR. FOOTE: Your Honor, I would like, if I may, to have another moment, please.

THE COURT: Of course.

MR. FOOTE: I believe that to effectuate your Honor's order that it is wise for me to look at this from the standpoint of what is in the interests of a young dentist, and I have thought about that a great deal because it is certainly pointless for me to look at it any

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other way because as I read your Honor's opinion it is the dentist, the young dentist, who is going into the business who wants to look to get a source of supply for equipment. Your Honor, that is the public interest. He is the guy that wants to have alternative sources of supply so that there will be price competition and all the other problems that our system will operate. I have looked at it that way.

If your Honor orders us to divest the equipment sales of General and Hebard and Sechter, we will be back to the several hundred thousand dollars of equipment sales that we had prior to 1969. And, your Honor, General was in a state of a creditors' committee, being operated under a creditors' committee for two years before we bought them. If we float that company, your Honor, sell those assets, sell what is left, I respectfully suggest to the Court that that company, with the equipment business that we now have, that company floated will not make it in this industry.

I respectfully suggest to the Court that if we take all our equipment sales and sell it to another entity, company X, that still the young dentist in New Jersey or White Plains can only look to one company for his source of supply.

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I was hoping to construct, meet with the Department of Justice and construct, additional competition by some method of allocating our properties so that a new company might be created, and we would remain in the business giving the dentist an alternative.

Now, your Honor has suggested that the Government will object to that by saying that such a company, created in that fashion, will no longer endure.

Your Honor, I respectfully suggest to the Court that the people I have talked to in the business, who are professionals, would say the same thing, with all due respect, about your Honor's suggestion that we sell the equipment business.

Now, I think it may well get down to manufacturing lines. I was prepared to prove today, and I have affidavits, your Honor, that we know of twenty-six new manufacturers that have come into the business since 1970, which is the date most of the evidence was related to, and that I believe that we could go a long way in getting a company into the business with manufacturing ties, making it a viable competitor. It is not as if we had all the perfect options in the world, because, your Honor, no matter what kind of a company that is created, somebody could say that thatcompany will not survive, and we were hoping to

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have a chance to present to the Court in evidence and other things what the industry looks like. Because your Honor is going to order divestiture to take effect in today's structure, not that of 1970, and I do not know any other way to do this, your Honor, than to bring to the attention of the Court, for this Court's review, what has happened since 1970. And I do not do this in the idea of delaying the matter at all. I respectfully object to that.

THE COURT: I do not even understand what it is you are asking.

MR. FOOTE: I want a hearing.

THE COURT: You want a hearing on what?

MR. FOOTE: I want a hearing --

THE COURT: I have pointed out that your paper, that you filed, is nothing but frivolous. It has nothing to it. It simply says that the Court has jurisdiction of the subject matter, and then that the plaintiff is directed to prepare a proposed final order and memorandum. That is absolutely nonsense. The plaintiff, at the time you served this, had already prepared, served and filed a proposed final order. No memorandum of law, but God knows we do not need any more of those.

What is it that you want? You have got no proposal here.

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MR. FOOTE: That is true, your Honor. Not in writing, but I have one I will be glad to put together and file with the Court as promptly as the Court wants to read it.

THE COURT: Well, what kind of a hearing do you want?

MR. FOOTE: I want a hearing to demonstrate the fact that to determine the effective kind of relief to be entered, your Honor should have in mind the manufacturers available, who is it that is now selling dental equipment, to whom, what companies have come into the market, how can we effectuate, if the Court please --

B4 THE COURT: How long will such a hearing take?

MR. FOOTE: I would say it will take a day, perhaps a day and a half, no more.

THE COURT: All right. Then can you have your proposal by tomorrow morning? And we will have the hearing on Thursday. Tomorrow is Wednesday and we will sit on Thursday. All right.

MR. SIRIGNANO: May I speak, your Honor?

THE COURT: Yes, of course. Although I am not very sympathetic to anything you want to say.

MR. SIRIGNANO: I realize that, your Honor. Your Honor, I have been listening to Mr. Foote's

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characterization and, respectfully, to your characterization of the order submitted by the Government. In this instance we attacked, as illegal under Section 7, four acquisitions by a company which was in the market. It is my understanding that following an adjudication of the illegality of those four acquisitions we were entitled to the divestiture of the four acquired companies, not in the form of a single company but in terms of an attempt to restore the situation of five competitive entities.

The proposed order submitted by the Government does not call for the defendant to get out of the dental supply business, it calls for them to divest the equivalent of that which was acquired and which your Honor has found was acquired illegally.

I would like to simply add one further fact, that currently the types of facts that Mr. Foote wishes to put forth before the Court on the hearing which is requested are the facts which were attempted to be put in in the course of a trial, an attempt to prove no liability, and I see them as totally irrelevant to the question of what relief the plaintiff is entitled to in terms of the adjudicated illegality of four specific acquisitions.

I regret your Honor feels as he does about the plaintiff and the Justice Department. I can assure you

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we have --

THE COURT: I think it is outrageous, outrageous. It is just a bureaucracy run wild, like a jungle plant. Like a jungle plant. No sense of proportion, nothing, nothing. No sense of proportion whatever.

But that is what happens when you get the proliferation of bureaucrats. Well, all right.

So we will meet here, then, and please not later than noontime. Let us have your proposals and we will meet here at 9:30 on Thursday.

MR. FOOTE: Your Honor, may I say one other thing? May we have leave to present the material, since there are witnesses around the country, by affidavit on Thursday?

THE COURT: Well, I do not know. Mr. Sirignano, what do you say to that?

MR. SIRIGNANO: I am totally unable to respond. I have not the slightest idea what it is that Mr. Foote intends to put forth.

THE COURT: I haven't either. I mean, we are both in the same shape.

MR. FOOTE: Your Honor, what my proposal was, to save the Court's time, we will file the proposal with affidavits, and if your Honor would want to take both

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those on Thursday we can have them all on your desk, with your Honor and Mr. Sirignano on Thursday, and we will not have to take the Court's time up with a hearing.

THE COURT: We will have to give the Government a chance to study it.

MR. FOOTE: Yes, your Honor.

THE COURT: What I am specifically interested in is, since I have to make a final judgment, and at the moment I have only one before me, and in the absence of anything else I will have to sign it, what is the alternative?

MR. FOOTE: Your Honor, may we have leave, then, to file our proposal with supporting affidavits by 10:00 a.m. on Thursday morning?

THE COURT: Well, suppose you bring them in here on Thursday morning. All right, 10:00 a.m. I usually start at 9:30 but 10:00 a.m. And then we can recess for the length of time that it will take to read them, and the Government will be here. The Government can read them in the witness room and I can read them in the robing room.

MR. FOOTE: Thank you, your Honor.

THE COURT: But this thing, this thing just cannot go on any longer. So you are going to come in with a proposed counterorder and affidavits in support of it.

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MR. FOOTE: Yes, your Honor.

THE COURT: At 10:00 a.m. on Thursday morning.

MR. FOOTE: That is correct.

THE COURT: All right. Then that is the way it will be. We will meet here on Thursday morning at 10:00 a.m. and we will see what papers are submitted; and then, Mr. Sirignano, I will give you and your colleagues a chance to sit down and go over it, and as soon as you have a chance to do that then we will meet and I will give you a chance to be heard.

MR. SIRIGNANO: Thank you, your Honor.

THE COURT: All right. Then we will see what happens. All right. Thank you.

* * * *

Filed 4/3/75

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT

I, IRWIN KALIK, being first duly sworn, deposes and says as follows:

1. I have knowledge of the following facts from my personal observation or based upon an examination of the books and records of Healthco, Inc. under my direct supervision and control.

2. I am an executive vice-president of the Healthco Dental Supply Division and am familiar with the sale of dental products in Metropolitan New York. My present position is New York Regional Manager for Healthco.

3. In the four New York area Healthco stores, dental equipment is sold primarily by specially trained salesmen designated as equipment specialists. These equipment specialists sell equipment exclusively. The sales of these equipment specialists account for between 85 and 90% of total Healthco equipment sales. The remaining 10% to 15% of equipment sales are primarily incidental sales of small equipment items made by Healthco's other salesmen.

4. In each of Healthco's New York area operations, the equipment specialists and their length of service is as follows:

Rower

Equipment Salesman	Years of Service
Norman Berkowitz	4
Ronald Minor	3
Frank De Francisco	6

Sechter

Carl Waxman	8-9
Arnold Cohen	2-1/2
Will Carlin	less than 1

Hebard

Robert Irwin	15

Hebard Metro

James Fanto	2

5. In each store, the number of equipment specialists today is the same as or greater than the number of equipment specialists employed at the time of the stores' acquisition by Healthco. The three former companies, S.S. White, General and National which now are known as Rower had a total of two equipment specialists at the time of their acquisition. Sechter had two equipment specialists at the time of its acquisition. Hebard has had the same equipment specialist as at the time of its acquisition. Hebard Metro had one equipment specialist at the time of its acquisition.

6. At the Rower branch, located at 331 W. 44th Street in New York City, Healthco maintains a service department for equipment. This service department currently employs 9 equipment servicemen and 4 clerical and supervisory personnel.

7. Healthco owns the building which is now occupied by Rower. That building has approximately 16,000

square feet of space. The facilites at that building include warehouse space, an equipment showroom, drafting department facilities for dental office design, a shipping and receiving area and administrative offices.

8. The equipment lines acquired by Healthco at the time of its New York acquisitions are as follows:

1. Ritter Company, Rochester, New York
2. S.S. White Company, Philadelphia, Pennsylvania
3. General Electric Company - Dental X-ray Division, Milwaukee, Wisconsin
4. Weber Company, Canton, Ohio
5. Valtronic Corporation, Bronx, New York
6. Dental Eze Company, Des Moines, Iowa
7. Costal Dynamics Corporation, Santa Monica, California
8. Chayes Dental Company, Danbury, Connecticut
9. Mid-West American Dental Manufacturing Company, Chicago, Illinois
10. American Cabinet Company, Two Rivers, Wisconsin
11. Phillips Medical Systems, Shelton, Connecticut
12. Pelton & Crane Company, Charlotte, North Carolina
13. Star Dental Manufacturing Company, Philadelphia, Pennsylvania

9. Sales of the equipment lines listed in paragraph (8) above currently represent approximately 85% of Healthco's equipment sales to dentists.

10. Healthco's business records reflect the names of all of the dentist customers of Healthco's New York area equipment specialists.

Irwin Kalik
IRWIN KALIK

Subscribed and Sworn to before
me this 2ND day of April, 1975.

Leander T. Brown
Notary Public

LEANDER T. BROWN
No. 41-4517590
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Filed 4/3/75

AFFIDAVIT

I, IRWIN KALIK, being first duly sworn, deposes and says as follows:

1. I have knowledge of the following facts from my personal observation or based upon an examination of the books and records of Healthco, Inc. under my direct supervision and control.

2. I am an executive vice-president of the Healthco Dental Supply Division and am familiar with the sale of dental products in Metropolitan New York. My present position is New York Regional Manager for Healthco.

3. Healthco entered the Metropolitan New York dental products supply business in January, 1969 when Healthco's Rower Division purchased S. S. White's dental dealerships in the New York area. The major lines of dental equipment which Healthco sold in Metropolitan New York following the S. S. White acquisition were those manufactured by the following companies:

1. Ritter Company - Rochester, New York (dental units, X-ray machines, chairs, cabinets, etc.)

2. S. S. White Company - Philadelphia, Pennsylvania (dental units, X-ray machines, chairs, cabinets, etc.)

3. General Electric Company, Dental X-Ray Division - Milwaukee, Wisconsin (dental X-ray units)

4. Weber Company - Canton, Ohio
(dental units, X-rays, chairs, cabinets, etc.)

5 Valtronic Corporation - Bronx, New York
(cabinets)

6. Dental Eze Company - Des Moines, Iowa
(dental units, chairs, cabinets)

7. Costal Dynamics Corporation - Santa Monica, California
(dental units, chairs)

8. Chayes Dental Company - Danbury, Connecticut
(dental units, chairs, cabinets)

9. Mid-West American Dental Manufacturing Company-Chicago, Illinois
(dental units, chairs and cabinets)

10. American Cabinet Company - Two Rivers, Wisconsin
(cabinets)

11. Phillips Medical Systems - Shelton, Connecticut
(X-rays)

12. Pelton & Crane Company - Charlotte, North Carolina
(dental units, chairs, cabinets and lights)

13. Star Dental Manufacturing Company - Philadelphia Pennsylvania
(dental units)

No new equipment lines were added to Healthco's inventory as a result of the acquisition of General Dental Supply Co., Inc.

No new equipment lines were added to Healthco's inventory as a result of the acquisition of M.A. Sechter Dental Equipment and Supply Co., Inc.

No new equipment lines were added to Healthco's inventory as a result of the acquisition of Hebard-Metro Dental Company, Inc.

4. During the last six years, there has been a substantial increase in the number of manufacturers of

dental equipment. Today, there are over 40 domestic manufacturers of dental chairs and a number of foreign chair manufacturers who compete for sales in the United States.

Since 1969, there have been eleven (11) new companies who manufacture and sell dental chairs. Those companies are as follows:

1. Dentsply
2. Litton
3. Midwest American
4. Parkell
5. Pelton & Crane
6. Unitek
7. Micro
8. Scope
9. Ormco Corp.
10. Morse
11. Westwood Dental Mfg. Co.

5. Today, there are over fifty (50) manufacturers of dental units in the United States. Twenty-six (26) of these companies have entered the market since 1969. Those companies are:

1. Belvedere
2. Biotec
3. Dental-Ez
4. Dentsply
5. Health-Kit Corp.
6. Litton
7. Parkell
8. Pelton & Crane
9. Star
10. Unitek
11. Health-Science Products
12. Hi-Low Dental Equipment
13. Shelley
14. Proma (Progressive Machine Products)
15. Scope
16. Simplified Concepts
17. Viking Inc.
18. Ergonamic Environment Inc.
19. Executive Cabinet Co.
20. Erik Industries
21. Morse

22. McKesson
23. Beaver State Dental
24. Burton Cabinet Co.
25. Winders of Seattle
26. Lelaxadent

6. Since 1969 more than 25 other companies have entered the market selling smaller pieces of equipment.

7. Within the last three years, additional dental dealers have entered the Metropolitan New York area selling dental equipment. A partial list of these firms follows:

a) The Avis Leasing Co., 666 Fifth Avenue, New York, New York, which began as a dental equipment leasing company, now also sells all major lines of dental equipment.

b) University Dental Supply, 200 E. 23rd Street in New York, entered business within the last six months as a full service dental dealer. This company has announced that it is offering all major brands of equipment and supplies.

c) Salzman Dental Co., 902 Coney Island Avenue, Brooklyn, New York, began selling dental equipment and service for that equipment within the past year.

d) The Becker-Parkin Dental Supply Co., Inc., 147 W. 42nd Street in New York, formerly sold only dental sundries in the New York area. During 1974, new owners expanded operations and began selling dental equipment.

e) City Dental Supply, 369 Washington Avenue, Garden City Park, New York, previously sold only small amounts of dental equipment to institutions. Within the past two years, this company has begun selling equipment

to dentists. Recently, within the past six to eight months, they opened a new equipment showroom in Garden City Park on Long Island. They now offer all major lines of equipment to dentists.

(f) Ripco, 461 Court Street, Brooklyn, New York, has within the past two years entered the dental equipment market. This company does not sell sundries, but offers a full line of equipment and service.

g) I. Chodos, 241-21 Braddock Avenue, Bellrose, New York, has recently expanded its equipment sales. Within the past year, they have added a new service department and have become a major full service dental dealer.

h) M&M Dental Supply, 231 E. 14th Street, New York, has within the past year come under new ownership. This company has expanded its sales to include dental equipment as well as sundries under its new ownership.

i) Newark Dental, 726 Fairfield Avenue, Kenilworth, New Jersey, was formerly only a sundry dealer. Within the past year, this company has begun to offer major equipment lines.

j) American X-Ray, 568 Grand Avenue, Englewood, New Jersey, formerly offered service for dental X-ray equipment. Within the past two years, this company has begun selling as well as servicing dental X-ray equipment.

8. Mail order companies have increased their equipment sales and have expanded the scope of the equipment

lines they offer. Specific examples of these companies are:

a)	Blank/Sherry	Bay Shore, NY
b)	Darby	100 Banks Avenue Rockville Center, NY
c)	By-Rite	Box 200 210 Ditmas Ave., Brooklyn, NY
d)	Wolins	Farmingdale, NY
e)	Interstate Drug Exchange	Engineers Hill Plainview, NY
f)	Unitek	140 Sylvan Ave., Englewood, NJ

These companies are now advertising many major equipment lines.

9. One new mail order house, the Alger Equipment Company, located in Texas, has entered the market within the past year and specializes in equipment sales.

10. Numerous independent contractors have recently begun selling equipment. Many of these small sellers are also independent servicemen. Many equipment manufacturers have begun selling directly to these independent contractors. While the precise volume of this business is unknown to me, it now presents substantial daily competition to Healthco. Tony Riso, located at 149-58 21st Ave., Whitestone, New York, is one such example. Carl's Gas, located at 241-15 Braddock Ave., Melrose, New York, formerly sold only anesthetic gas to dentists. Recently, this company has begun selling gas equipment directly to dentists, as well.

11. Approximately thirty percent (30%) of dental equipment sales to dentists are to new dentists who are setting up practice. The other purchases by dentists of particular items or pieces of equipment are selected from catalogues and the established dentists buy such items direct from manufacturers or from a dealer.

12. In 1974 Healthco sold in Metropolitan New York approximately $1.2 million of dental equipment to new dentists. Other sales of dental equipment were made to institutions, established dentists and laboratories; such sales were of particular pieces and Healthco in making these sales competed with new manufacturers, dealers and mail order houses listed above (as well as the many pre-existing manufacturers and other competitors.)

13. In 1974 Healthco's total equipment sales in Metropolitan New York to all dentists was $3.8 million.

Irwin Kalik
IRWIN KALIK

Subscribed and sworn to before
me this 2nd day of April, 1975.

Leander T. Brown
Notary Public

LEANDER T. BROWN
No. 41-4517500
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1976

Filed 4/3/75

AFFIDAVIT

I, LUDWIG WALTER, reside at 69-43 173rd Street, Flushing, New York. I have knowledge of the following facts:

1. I am the Executive Vice President of Walter Dental Supply, Inc., which is located at 275 Huyler Street, Hackensack, New Jersey.

2. Our total equipment sales have been as follows in the following years:

1970	$ 883,515.68
1971	1,306,124.06
1972	1,681,675.66
1973	1,926,992.27
1974	2,430,583.72

3. Our total sales of service and repair have been as follows in the following years:

1970	$ 160,314.78
1971	208,502.77
1972	277,179.05
1973	339,607.41
1974	415,874.54

4. We do not maintain a breakdown of equipment sales to classes of customers in our books and records.

Our equipment sales to dentists, however, are more substantial and have been increasing at a faster rate than our equipment sales to institutions.

Ludwig Walter

Subscribed and sworn to before
me this 19th day of March, 1975.

Notary Public

My Commission Expires

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Filed 4/3/75

AFFIDAVIT

I, HOWARD KROCHMAL, reside at 5700 Arlington Avenue, Bronx, New York 10471. I have knowledge of the following facts:

1. I am the Vice President of Durable Dental Equipment Corp. which is located at 3001 Eastchester Road, Bronx, New York 10469.

2. Our total equipment sales have been as follows in the following years:

1970	$	219,375.00*
1971		464,694.00
1972		893,517.00
1973		895,026.00
1974		1,176,072.00

3. Our total sales of service and repair have been as follows in the following years:

1971	$	82,295.00
1972		125,256.00
1973		163,266.00
1974		196,191.00

4. These sales figures represent sales almost exclusively to dentists.

*Combined Equipment, Service and Repair.

Howard Krochmal
Howard Krochmal

Subscribed and sworn to before me this 20th day of March, 1975.

Sally Smith
Notary Public

SALLY SMITH
NOTARY PUBLIC, State of New York
No. 03-4603830
Qualified in Bronx County
Term Expires March 30, 1976

868a

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Filed 4/3/75

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT

JAMES V. DeMARCO, being first duly sworn, deposes and says as follows:

1. I am an attorney associated with the law firm of Winston & Strawn in Washington, D.C., an attorney of record in the matters of United States v. Healthco., Inc., 70 Civ. 1312 (S.D.N.Y.) and Central Dental Supply Corporation v. Healthco, Inc., 73 Civ. 380 (E.D.N.Y.)

2. During the course of pretrial discovery in Central Dental Supply Corporation v. Healthco, Inc., I obtained from attorneys representing the plaintiff figures disclosing that company's sales of equipment and repair for the years 1970 and 1974 which are as follows:

1970	$ 646,218
1974	$ 1,249,402

Based upon the representations made to me by Plaintiffs' attorneys, I believe the figures stated above to be accurate and true.

James V. DeMarco

Subscribed and sworn to this
1st day of April, 1975.

Notary Public

LEANDER T. BROWN
No. 41-4517590
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1976

eobr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against- : 70 Civ. 1312

HEALTHCO, INC.,

Defendant.

Before:

HON. INZER B. WYATT,

District Judge

New York, April 3, 1975
Room 102 - 10:00 a.m.

APPEARANCES:

JOHN SIRIGNANO, Esq.
MELVIN LUBLINSKI, Esq.
Department of Justice
Anti-Trust Division
Attorneys for United States of America

WINSTON & STRAWN, Esqs.
Attorneys for Defendant
By: James V. DeMarco, Esq.
Thomas W. Bianchi, Esq., of Counsel

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THE COURT: Good morning. Now, what does the defendant have to say this morning?

MR. DE MARCO: Good morning, your Honor.

The first thing I would like to say is that we apologize or Mr. Foote apologizes for notbeing here this morning. He was required to return to Chicago to represent a matter in court and got snowed in in O'Hare. We are, however, ready to proceed and I will do the best I can under those circumstances.

THE COURT: All right.

MR. DE MARCO: As we left on Tuesday, the defendant asked for the opportunity to present affidavits addressed to the question of our position that nodivestiture should be required at this stage of the case because of changed market conditions and we asked for a hearing on that matter and asked for the oppourtunity to make an offer of proof by way of affidavit.

I am prepared this morning to present four affidavits addressed to that question and I would like -- I have served them on the government --

THE COURT: In other words, you are suggesting that on the opinion of the court a decree should be entered in favor of the defendant?

MR. DE MARCO: In essence, yes, that would be

true, your Honor.

THE COURT: Isn't that a paradox?

MR. DE MARCO: Not necessarily so as I think the facts which are exhibited --

THE COURT: I mean for better or for worse and subject to review, I found that the law was violated.

ME. DE MARCO: Yes, your Honor.

THE COURT: Now, the law having been violated, why should I enter a decree in favor of the defendant?

MR. DE MARCO: The finding of the Court was that there may be substantial lessening of competition in the sale of dental equipment within metropolitan New York. That finding was based upon acquisitions which took place in 1969.

THE COURT: Yes.

MR. DE MARCO: The affidavits of Erwin Kalik, which I will hand up this morning, addressed to this question, he is regional manager and executive vice president, and the deposition of two of the witnesses at the trial, for example, excuse me, one company who was a witness at the trial was Walter Dental Supply, the executive vice president Ludwig Kalik has handed us an affidavit. Howard Krochmal, who was a witness, and my affidavit based upon discovery in a related matter all indicate that the defendant's performance

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in the sale of dental equipment nowhere near approximates the substantial growth of other competitors in the sale of dental equipment.

Mr. Kalik's affidavit points out that since the trial of this ccase 26 new manufacturers of dental chairs have entered the New York market and are now selling here. 13 new manfuacturers of dentalunits have since the trial of this case entered the New York market and are selling dental units here and a number of other smaller manufacturers are all here.

In addition, approximately 13 full service dental operations, according to Mr. Kalik's affidavit, have since the trial of this case entered the New York market. That was our position; that so many changes have taken place for the increase of competition that divestiture would no longer be required.

We are also prepared this morning, your Honor, to submit a final judgment in line with your Honor's very explicit order on Tuesday that divestiture of the equipment and of the business, some form be submitted to provide for that, so I am really arguing the alternative this morning. We think the evidence shows, since divestiture is an equitable remedy and the Court can consider these factors, that the competition has changed since the trial of this

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case, the competitive factor in the sale of equipment, that while your Honor found that there may be a substantial lessening of competition that we should have an opportunity to demonstrate that that is no longer true.

For that purpose we submit these affidavits. I am, however, prepared to go forward and comply with the express directive by submitting a form of final judgment that addresses solely the question of the equipment business acquired and a plan for divestiture of that business.

THE COURT: All right. Suppose you submit to the clerk for filing the four affidavits to which you refer and give a copy of those affidavits to counsel for the government.

MR. DE MARCO: I have done so this morning, your Honor.

I would also like to submit a separate and second affidavit of Mr. Kalik again that addresses itself simply to the question of why this proposed relief on the equipment area is appropriate. The reason why I asked him to prepare two affidavits is the first question is one on why no divestiture is necessary at this time.

I then put in a separate affidavit, Kalik 2, if we have to divest, what are the facts on that area.

THE COURT: Suppose we wait just a minute and give

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me a chance to look at these.

MR. DE MARCO: Yes, your Honor.

(Pause.)

THE COURT: Have counsel for the government had a chance to read these affidavits?

MR.SIRIGNANO: We are just reading them now, your Honor.

THE COURT: All right, I will wait until you are finished.

(Pause.)

MR. LUBLINSKI: We are prepared, your Honor.

THE COURT: All right.

Does the government want to comment on these affidavits?

MR. SIRIGNANO: Yes, your Honor. After reading the affidavits it appears to me that the facts which the defendant now seeks to place before the Court amount to nothing more than an attempt to retry the case.

Essentially, assuming the truth of these facts and we have no basis for knowing whether they are or not true, these are essentially the same type of facts which the defendant brought forth in an attempt to escape liability.

We think that they are completely irrelevant to

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the question of the type of relief to which the plaintiff is entitled following adjudication of illegality of the acquisitions.

I should say also, your Honor, that even assuming, and we don't believe that this is proper, that the only entitlement were to divestiture solely of equipment, that the proposed order does not in no way accomplish that and does to a great extent almost add up to the entry of a judgment in favor of the defendant.

THE COURT: I haven't seen the proposed order yet. We haven't come to that.

I will accept these affidavits for filing, but I don't think I will accept the suggestion that a judgment be entered in favor of the defendant.

So, Mr. De Marco, let us go to your second point that you have a method of carrying out the divestitute of the dental equipment business without the dental sundries business.

MR. DE MARCO: Yes, your Honor.

THE COURT: I indicated the other day that it seemed to me that that would carry out the motivation of the opinion.

MR. DE MARCO: Yes, your Honor, I understand that.

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THE COURT: Shall I take a look at it?

MR. DE MARCO: Yes, your Honor, if you would, please.

THE COURT: All right.

MR. DE MARCO: Mr. Sirignano has just read a second affidavit of Mr. Kalik addressed to this question and a proposed judgment.

THE COURT: And you have given these to counsel for the government?

MR. SIRIGNANO: Yes, your Honor, we have seen them.

THE COURT: All right.

Give me a chance to look at them.

(Pause.)

THE COURT: All right, Mr. Sirignano, I have looked at this proposed final judgment of the defendant.

I am now prepared to hear your comments.

MR. SIRIGNANO: Your Honor, I would like to address my comments to the question as to whether divestiture addressed only to equipment sales is, in fact, consistent with the Court's opinion.

We believe it is not. We believe that as a matter of law it follows that on the basis of your Honor's opinion that divestitute of all four acquired companies completely is required.

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If I may explain our position on that. You may recall, your Honor, that the government originally argued that there was a substantial lessening of competition among dental dealers in sale of all dental products and in the two sub markets of equipment and in sundries.

Your Honor found that there was no violation with respect to sundries and then found the violation with respect to dental sales of equipment.

Your Honor then stated that having found the violation in terms of equipment, it was not necessary to examine the question of the illegality of the acquisitions with respect to sale by dental dealers of all dental products.

Now, I believe it would be clear that had the Court fill illegality in terms of the broader market of all dental products, it would follow that we would have been entitled to divestiture of all four acquired companies in terms of their total operations; that having found the illegality solely with respect to dental equipment, it follows that the only basis upon which it can be unnecessary to have decided the question of illegality as to the market measured by all dental products is that it would entitle us to the same relief as it would be with respect to a finding of illegality with respect to all dental products.

This it seems to me is perfectly reasonable.

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That on the facts as shown in the course of evidence presented in the course of the trial, a proper return as far as possible to the status which existed at the time of the acquisitions to restore the competitive situation solely within the equipment field would require total divestiture.

The proposal made by the defendant with respect to the equipment market goes along the lines as if the sale of equipment and the position within the equipment market of the four acquired companies was something which existed completely separate from the total operations of those four acquired companies.

I believe that the evidence and the picture of dental dealer operation, was given your Honor in the course of the trial, make it clear that the position within the market for equipment as well as any other market of dental products has to do with the totality of operations. It has to do with the ability of the company to obtain the lines from a number of suppliers, which is a function of its total operation and its credit. It has to do particularly with the good will of the operation of companies who have been in the business for a long time, of the good will of individual dentists who deal on a weekly basis with the representatives of the dealer.

The very fact that in all the years in which dental

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dealers have been operating and the number may be as high as 60, only in one instance -- only in one instance in recent times has there been existent a dental dealer which sold only equipment. The fact is that -- that dental dealer was never relatively large compared to any of the acquired companies.

I think it is perfectly plain that to reestablish the competition which existed at the time of the acquisition within the dental equipment market it requires the divestiture of the four acquired companies or entities which approximate their position in the market at the time of the acquisition which includes the totality of the name, of good will, of the other products which were generally made available to the potential customers for dental equipment that the four acquired companies did at the time of their acquisition.

THE COURT: Mr. De Marco, I am not certain what happens. You say here in this proposed order that the defendant is directed to offer,to establish and sell. How am I to visualize that? Just a public offer and then, of course, if nobody comes around and says, we want to accept your offer, then you come back and say, we have complied with it so now let us go scott free.

MR. DE MARCO: No, your Honor, that would be paragraph 5 I think that you are readingnow.

Paragraph 4 is an explicit order to divest the business and that must take place within 15 months of the entry of this final judgment. According to the terms in paragraph 5. Paragraph 5 is the way the company would be constructed and would require the defendant within 120-day period to put this package together and to get it advertised and to make reasonable efforts to get it sold, but the sale itself of the new equipment corporation must be effected within the 15 months.

I would like to respond to some of Mr. Sirignano's comments and also to give an explanation of how this order was arrived at and what it is intended to do.

I think the best way of saying it is to begin by stating that we made a very conscientious effort to take those portions of the government's proposed judgment that were acceptable and within the confines of what Mr. Kaylik said to us would be possible. We said, Mr. Kalik, we are required under the Judge's order to find some way to carve out the equipment business. Now, I am sorry about that, we didn't win that point, let's live with that fact.

We have here the government's proposed judgment. Let's live with as much of this as we can. How can you best live with that fact and he explained, as I think is contained in his affidavit, the way Healthco conducts its

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equipment business, just that particular part of the business.

Healthco entered this market in 1969 by buying the S.S. White companies through its division and that wasn't challenged by the government. We also acquired another small business and we later acquired in 1969 the General Company. Now, those three concerns were all packaged together in the Rower facility here in Manhattan. It is the most central facility we have.

At that facility there are three people who specialize solely in the equipment sales. There is a repair shop there for chairs and units, whatever needs repair, and there are, I believe, nine men and women repairing dental equipment who work there and a showroom and sales take place in that building.

Following those acquisitions we embarked on the others. We got the one in White Plains, That's Hebard, we got the one in Syosset and we got the one in Hackensack. When we acquired those companies they were conducting at the time of the acquisition their equipment sales by using what is known in the trade as dental equipment specialists. A salesman who is there who handles 85 to 90 per cent of all the equipment sold. It is done in a specialized way. There are also show rooms, et cetera.

That is the way the equipment business is conducted so if it is to be carved out this is what we propose to do. If we had to simply, for example, take the one salesman who is a dental equipment specialist at a particular location out on Long Island and get rid of him and his customer list, we don't think that is very marketable. We don't think anybody knew, any new competitor coming into the market is going to want to buy it. We don't think we can sell it, if you will, but we do think that by giving the government and frankly, your Honor, I think in all candor it does giving them more than they won at the trial by including all of Healthco's dental equipment specialists, including the ones from Rower, the Rower acquisition, which is not even challenged here, and the national acquisition which is not even challenged here and including dental equipment specialists who have joined us since the time of the acquisition. We are talking about including in this package even more men than were with us at the time of the acquisitions.

By doing that we were putting together an equipment package in the most central facility here in Manhattan, putting that package together and we are offering it in good faith to comply with your Honor's order to sell it as an equipment package. The customer list, the dentists

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customer lists that went with those salesmen representing 85 per cent of all the equipment sales including the non-challenged acquisition of Rower will go with it to the new company.

We will agree to use our best efforts to transfer all the lines we had, everything we acquired in the equipment business with this new business to the new buyer.

Mr. Sirignano comments that nobody can make it just selling equipment. There is no prohibition here on the new buyers when he buys this new equipment company from getting sundry lines. He doesn't just have to operate an equipment business. We are not prohibiting that and we wouldn't. All we are doing is selling that end of the equipment business that we acquired.

THE COURT: What do you visualize Healthco will do after it has sold this dental equipment corporation. Won't it sel dental equipment itself?

MR. DE MARCO: It would, your Honor, but not to the same dentist customers, which are virtually all of the major lines of equipment available now. There are other newer lines, Ritter, S.S. White, these as the hearing showed are the traditional names. For two years Healthco was barred by this judgment order and by the way that figure and this concept is adopted directly from the government's

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proposed judgment, is barred from callong on those same dentist customers and selling that same dental equipment that we sold before.

The salesmen will be transferred to the new company. They will have to leave. Their customer lists will be prepared from records we have now. The dentists that they called on, those will be transferred to the new company and it would be a violation of your Honor's order for a new -- we will have to go out and hire new salesmen, that is true, and it would be a violation of the order for that new salesmen of ours to call for two years on those old customers and that is conditioned upon the same condition that the government placed in its proposed area dealing with this topic that the buyer wanted that.

Frankly it is anti-competitive but it falls in line with the context of this case. If the new buyer doesn't want that, if he says I don't care if your salesmen don't compete with us, we won't be violating the order, but these are facts which will come up under the operation of the judgment.

It has been a good faith effort in trying to comply with the ideas stated very clearly in your Honor's opinion and reaffirmed on Tuesday morning here that we carve out a program that dealt explicity with the equipment

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sales and I think we have gone in this proposed judgment beyond what was required by the order, but we have gone to the extent that we honestly believe necessary to put together a package that will be salable on the market and will result in the addition of at least one new competitor.

THE COURT: Suppose it is sold, though, I still don't understand. The day after the new dental equipment corporation is sold, what kind of dental equipment operation will Healthco be conducting?

MR. DE MARCO: It will have lost all of its dental equipment specialists at that point. It will have to go out and get new employees who will be working in that area.

They will not be able to call on any of the old dentist accounts in Metropolitan New York so these new salesmen are going to have to call on new accounts that weren't called on before and, by the way, I want to make clear that this isn't just the dentist accounts prior to the acquisition, we are talking about the dentist accounts up to the day of the signing of this order. We will still be in the business, but we will have to be calling on enw accounts in new areas with new salesmen. After all, what we are getting rid of here is all we bought when we bought those businesses in the dental equipment area. We bought the

the business, it is more what we got, in fact, your Honor. We got a salesman, we got his lists and we conducted the business in equipment in exactly that way.

The new buyer will be getting our salesmen and we will be getting the customer lists and the lines we dealt with, all the premium lines in the dental equipment field.

THE COURT: Suppose that nobody wants to buy the new dental equipment corporation. Then what happens?

MR. DE MARCO: I know, but I am trying to phrase the answer properly, Judge. I hate to say this, but I think we have to face that question as time goes along.

We are certain and I think the Kalik affidavit both 1 and 2 would indicate this, that if we took the piece-meal approach that the government wants and divided these up into little units, try to sell one salesman and one small customer list out in Syosset and another one over in White Plains, we are certain in our own minds that only one buyer is going to come in and want to buy all of them together any way because they aren't buyable -- strike that -- I don't believe that to be viable in my own judgment although we would have to try that out in the long-run standing as independent units, but by packaging them in this way we think a buyer will come along.

I must say if no one does that question is the

same under the government's proposed judgment as it is under ours. We just simply have to come in and do our best.

If within 15 months no buyer has appeared, we will have to either come up with another man or present that evidence to your Honor at the time it occurs.

I further would like to say --

THE COURT: But when I asked the question first you directed me to paragraph 4 of this proposed judgment of the defendant and you said that the defendant was ordered and directed within 15 months to divest itself.

MR. DE MARCO: Yes, your Honor.

THE COURT: I understood you to suggest that that was an outright mandate to divest yourself of it even if it meant giving it away.

MR. DE MARCO: Paragraph 4 specifically says to follow the program outlined in paragraph 5. We must divest by following the program under paragraph 5. That program I have already outlined and I think it will work.

THE COURT: It doesn't. That may have been your intent, but the document doesn't say that.

It says that it is directed to divest itself of the dental equipment corporation to be established under Section 5 of the final judgment.

MR. DE MARCO: You are correct, your Honor, it

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doesn't say that and it should. It would be our intention to follow in good faith efforts the program in part 5, which we believe will work and which we want an opportunity to try and which we will use our best faith efforts to achieve, but if it did not, well, I don't want to speculate. I think it is going to work.

THE COURT: Of course, there is nothing in here as to what the sale price should be.

MR. DE MARCO: Yes, that is true and neither was there in the specific proposal of the government. I am fairly new at this, your Honor, but my understanding is that once these orders are entered then the usual and customery negotiations are entered into. The order provides that we keep the Department of Justice and the Court informed of what would go on and I would presume that the procedure would be at some moment we are going to have a buyer, we are going to agree on the price and the terms. The Department of Justice is going to be advised about that as provided for in here every two months as the progress goes along and when the deal is closed, we will come in and I am certain at that point and inform the Court that the matter is officially and finally terminated by the divestiture having taken place. I can see no other way of handling the situation today.

THE COURT: I suppose that at the end of 15 months if it has been impossible to sell the dental equipment corporation, then I could enter an order which would be in substance that now proposed by the government.

MR. DE MARCO: I would hope under that contingency 15 months from now that if this plan hasn't work that your Honor would be receptive to examining for the purpose of appropriate relief alone under the rationale of Brown Shoe and other cases what the facts of the market were at that time. If they required it, if there was no other way of handling this problem and total divestitute, then I suppose that could be one remedy, but it is an extreme and drastic remedy and I think we can wait for that period of time.

Give this program a chance. Let this carving out of the equipment business, the establishment of a facility for it, all the salesmen we received and their dentist customer lists, the repair facility and its employees, let's make an effort to take what we acquired and more, put it in a package and give this program a chance. I think we will have to see what happens within the 15-month period.

THE COURT: But I am faced here with a request by the government to sign a proposed judgment completely divesting the four challenged acquisitions and I am faced by your counter proposal to divest only the dental equipment

part of the four challenged acquisitions and my inclination is to recognize the speculative results of your proposal, but to give you an opportunity to digress in that fashion and if that proves unworkable then to adopt the proposal of the government.

MR. DE MARCO: I understand, your Honor.

THE COURT: Mr. Sirignano, do you have any comments as to any details of this proposed final judgment?

MR. SIRIGNANO: As presented by the defendants, your Honor?

THE COURT: Yes.

MR. SIRIGNANO: Yes, your Honor. I find that the approach suggested by the defendant is so at variance with the established tenets of anti-trust law that I find it difficult to focus on it.

Your Honor, in 1969 a dentist going into practice had the choice of five -- at least five full line dealers each of whom sold dental equipment. Each of them was a major factor.

Through the illegal acquisitions, four of those major factors in the dental equipment market were eliminated by the acquisitions which the Court has found to be illegal.

It seems to me that no type of relief which does

not in good faith attempt to reestablish four viable companies, each of whom will regain their position in the market, can answer this.

Even assuming -- even assuming -- that some buyer could be had for this so-called dental equipment corporation, which defendant proposes, and my experience as I have cometo know dental dealers and the market over the five years of my being with this case, leads me to believe sincerely that there is not a chance of anyone being even seriously interested in a corporation selling equipment as described by Mr. De Marco.

However, even assuming that it were possible, what has happened? What will the situation be?

One, having eliminated four major competitors in the dental equipment field by the illegal acquisitions, now the defendant is simply reestablishing one competitor instead of the four.

Now, that one competitor, let us examine this. Mr. De Marco states, for instance, that having established this one competitor and as far as I can see it appears to me realistically looking at the proposition the dismissal of a handful of employees. Having said we will now set up a corporation to whom we will assign these employees, we will then rehire, we will ourselves hire more dental equip-

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ment salesmen.

We will not send these dental equipmetn salesmen to any of the dentists to whom we have previously sold.

One thing which is not mentioned is the fact that these same dentists will continue to be visited by presumably their sundries salesmen. The sundries salesmen who continue to maintain the close relationship between those dentists and Sechter, General and the two Hebards, the illegally acquired companies, the continuing relationship will be there and I would assume that Mr. De Marco and the defendant would say they would refuse to say they would not sell equipment to any of these dentists. This will certainly be known to any proposed buyer of this so-called single equipment company, that, yes, the equipment salesman will not callupon the former customer, the equipment customers of the defendant, but they will continue to be visited on a regular basis by the sundries salesmen of the acquired companies in such a manner that the newly established company would have no chance of success in such a field.

I still come back to the question that four illegal acquisitions were made in the dental equipment field. The the proper remedy for illegal acquisitions are such divestiture as will bring back as much as possible the competitive situation which existed at the time of the

illegal acquisitions; that remedy should be the setting up of four companies which will be as strong now in the dental equipment field as they were in 1969 at the time of the acquisitions and the only way that that can be accomplished is by the complete divestitute of the corporations of which that dental equipment business was a part which includes the totality of its operations, including the names and the good will which went with it.

THE COURT: Mr. De Marco, I am going to give you a period to see if this will work. I don't think I will give you 15 months. I think we will give you 12 months and it is worth your while, that is your clients while, to try to make this work because, as I say, if it doesn't work, then I am going to sign an order substantially or a judgment substantially as now proposed by the government.

MR. DE MARCO: I understand, your Honor.

MR. SIRIGNANO: I must respectfully take exception to your Honor's decision.

THE COURT: Of course.

MR. DE MARCO: Paragraph 4 should be corrected and conformed on all the companies to 12 months.

Thank you, your Honor.

THE COURT: Now, Mr. Clerk, I have signed this final judgment which can be filed.

I have received the second affidavit of Kalik. This is the file copy of the opinion.

This is the original notice from Mr. De Marco of a counter proposed final judgment. That has been superseded which should be made a part of the clerk's file.

This is a letter, dated March 19th, from Mr. De Marco to me with a copy of his first proposed judgment and this is a copy of the proposed final judgment of the government and notice of settlement which ought to be made part of the clerk's file and the government, of course, can renew at the end of 12 months if the plan of the defendant doesn't work, then I will put into effect the government's proposal.

All I think I am doing at this point is giving the defendant a chance to comply with the decision of the Court by divesting itself of the dental equipment part of the business of the four acquired companies and if it cannot be done in that fashion, then I will do it at the end of the 12 months the way the government has proposed.

All right, Mr. Clerk, the court will be in recess.

(Adjourned.)

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SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	70 Civ. 1312 (I.B.W.)
HEALTHCO, INC.,	:	Filed 4/3/75
Defendant.	:	

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein, on April 2, 1970, and after a full trial on all issues and the Court having rendered its opinion, findings of fact and conclusions of law herein on January 14, 1975:

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter herein and the parties hereto.

The effect of the acquisitions by Healthco, Inc. (Healthco) of the assets of General Dental Supply Co., Inc. (General), M.A. Sechter Dental Equipment & Supply Co., Inc. (Sechter), Hebard Dental Supply Co., Inc. (Hebard Dental) and Hebard-Metro Dental Co., Inc. (Hebard-Metro) may be substantially to lessen competition in the sale of dental equipment by dental dealers in Metropolitan New York, in violation of Section 7 of the Clayton Act (15 U.S.C. § 18), as amended.

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II.

As used in this Final Judgment:

(A) "Dental equipment" shall mean dental units, dental chairs, dental X-ray units, dental cabinets and dental lighting equipment.

(B) "Manufacturers' lines" shall mean those items of dental equipment manufactured by the following companies:

1. Ritter Company, Rochester, New York
2. S.S. White Company, Philadelphia, Pennsylvania
3. General Electric Company - Dental X-ray Division, Milwaukee, Wisconsin
4. Weber Company, Canton, Ohio
5. Valtronic Corporation, Bronx, New York
6. Dental Eze Company, Des Moines, Iowa
7. Costal Dynamics Corporation, Santa Monica, California
8. Chayes Dental Company, Danbury, Connecticut
9. Mid-West American Dental Manufacturing Company, Chicago, Illinois
10. American Cabinet Company, Two Rivers, Wisconsin
11. Phillips Medical Systems, Shelton, Connecticut
12. Pelton & Crane Company, Charlotte, North Carolina
13. Star Dental Manufacturing Company, Philadelphia, Pennsylvania

(C) "Dental Equipment Specialists" shall mean those employees of Healthco who are now employed to sell manufacturers lines of equipment at Healthco's dental dealerships located in New York City(Rower Dental Supply); Hackensack, New Jersey (M. A. Sechter Dental Supply); Syosset, Long Island, New York (Hebard-Metro Dental Supply); and White Plains, New York (Hebard Dental Supply) or the successors of those employees who may be so employed on the date of the divestiture ordered in Section IV of this Final Judgment.

III.

The provisions of this Final Judgment shall apply to defendant, its officers, directors, agents and employees, and to each of its subsidiaries, successors, and assigns, and to each of their respective officers, directors, agents and employees, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment.

IV.

Defendant is ordered and directed within ~~fifteen~~ twelve (~~15~~ 12) months from the date of entry of this Final Judgment to divest itself of the Dental Equipment Corporation to be established pursuant to Section V of this Final Judgment.

V.

(A) Within one hundred-twenty (120) days from the entry of this Final Judgment, defendant is directed to offer to establish and sell a Dental Equipment Corporation constituted as follows:

1. The building currently occupied by Healthco's Rower Division located at 331 West 44th Street, New York and all facilities there maintained to operate the dental equipment service and repair department at that building.

2. All employees who as of the date of this Final Judgment are employed as service and repair personnel at Healthco's Rower Division.

3. All Dental Equipment Specialists employed by Healthco as of the date of entry of this Final Judgment.

4. A list of all those dentists who are dental equipment customers assigned to each Dental Equipment Specialist as of the date of entry of this Final Judgment.

5. Transfer to said Corporation rights to sell and distribute the dental equipment lines referred to above and Healthco is directed to use its best efforts to facilitate the buyer's ability to obtain such manufacturers' lines.

(B) Healthco shall make known the availability for sale of the Dental Equipment Corporation to be divested by the usual and ordinary means for the sale of a business.

(C) Healthco is enjoined and restrained from reacquiring the Dental Equipment Corporation or assets divested pursuant to this Final Judgment, provided, however, that Healthco may retain a bona fide security interest in such Corporation or assets given to secure the payment of the purchase price therefor, and if Healthco should thereafter reacquire the Corporation or assets, Healthco is ordered to divest such reacquired Corporation or assets in accordance with the provisions of this Final Judgment within one (1) year from such reacquisition;

VI.

Upon the written request submitted to Healthco by the buyer of the Dental Equipment Corporation established pursuant to this Final Judgment, Healthco is directed and ordered for a period of two (2) years from the date of divestiture to refrain from soliciting sales of the manufacturers' lines of dental equipment from those customers of Dental Equipment Specialists contained in the customer

list prepared pursuant to Section V(A)(4) of this Final Judgment.

VII.

Healthco is enjoined and restrained for a period of five (5) years from the date of entry of this Final Judgment from acquiring directly or indirectly, any financial interest in a dental dealership which sells manufacturers' lines of dental equipment, as defined herein, located within Metropolitan New York without prior approval of this Court and upon notice to this Court and upon notice to the plaintiff.

VIII.

Within ninety (90) days of entry of this Final Judgment and for every two (2) months thereafter, Healthco shall file written reports with the plaintiff setting forth steps taken to comply with Sections IV and V of this Final Judgment.

IX.

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege, and subject to the presence of counsel if so desired;

(1) Access during its office hours to all books, ledgers, accounts, correspondence, memoranda, and other

records and documents in the possession of or under the control of the defendant relating to any matters contained in this Final Judgement; and

(2) Subject to the reasonable convenience of defendant and without restraint or interference from it to interview officers or employees of defendant regarding any such matters.

Defendant, upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports to the Department of Justice with respect to any matter contained in this Final Judgment as may be requested from time to time. No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of determining or securing compliance with this Final Judgment or as otherwise required by law.

X.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgement to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the

punishment of violations thereof.

XII.

Each party shall bear its own costs in this matter.

Dated: April 3, 1975

(s) Inzer B Wyatt
UNITED STATES DISTRICT COURT

DOJ-1975-08